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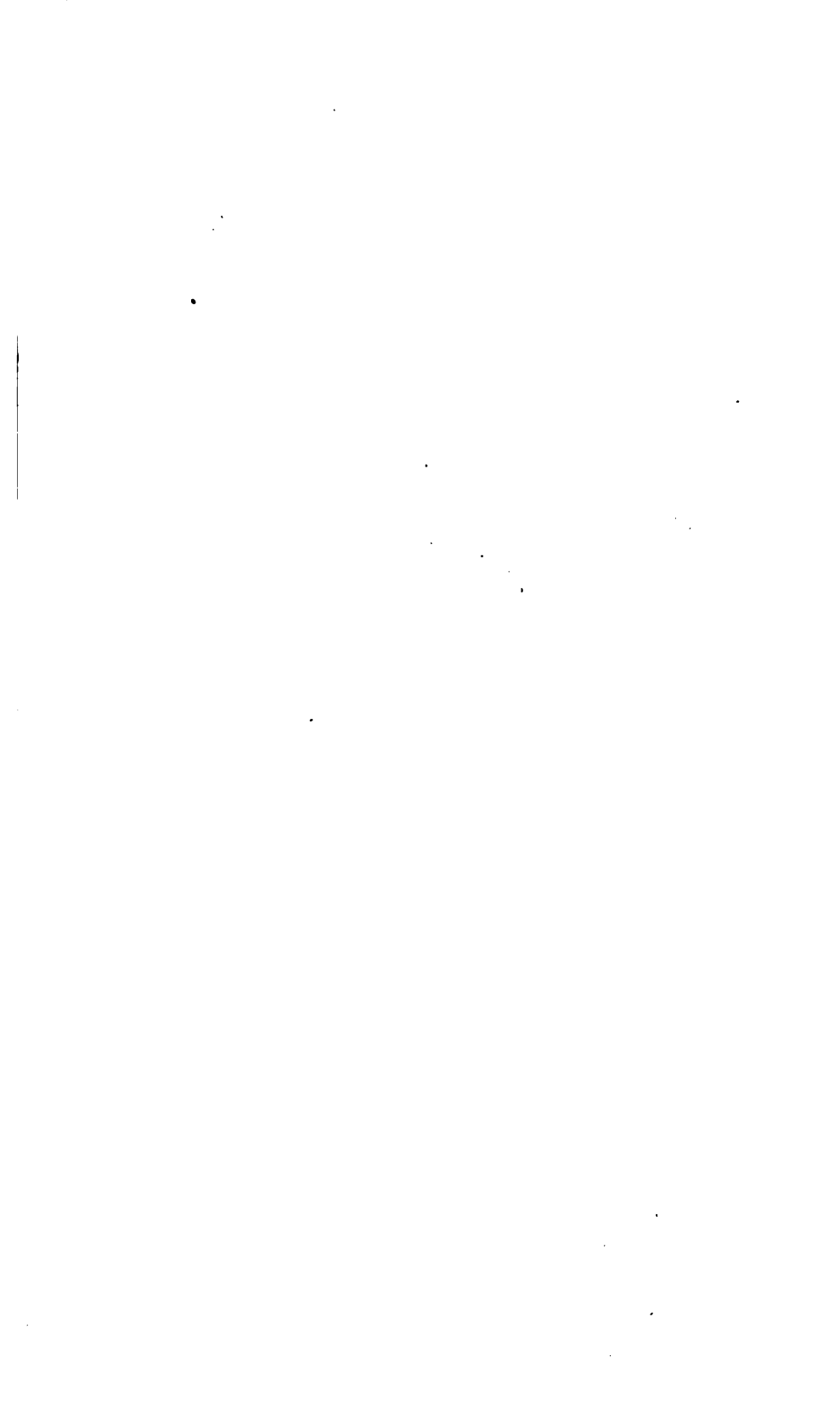




















# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

*Circuit Court of the United States*

FOR THE SECOND CIRCUIT.

---

BY SAMUEL BLATCHFORD,

JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.

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VOLUME XIII.

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**JUDGES**  
**OF THE CIRCUIT COURTS OF THE UNITED STATES**  
**WITHIN THE SECOND CIRCUIT,**  
**DURING THE TIME OF THESE REPORTS.**

---

**WARD HUNT, Associate Justice of the Supreme Court  
of the United States.**

**LEWIS B. WOODRUFF,\* }  
ALEXANDER S. JOHNSON,\* }**  
**Circuit Judge of the Second Judicial Circuit.**

**DISTRICT JUDGES.**

**SAMUEL BLATCHFORD, Southern District of New  
York.**

**WILLIAM J. WALLACE, Northern District of New  
York.**

**CHARLES L. BENEDICT, Eastern District of New  
York.**

**DAVID A. SMALLEY, Vermont.**

**NATHANIEL SHIPMAN, Connecticut.**

---

\* The Honorable LEWIS B. WOODRUFF died September 10th, 1875, and the Honorable ALEXANDER S. JOHNSON was appointed Circuit Judge of the Second Judicial Circuit, in his place, October 25th, 1875.

\* \* *The following correction should be made in this Volume :*

Page 335, 12th line from bottom, for "described" read "directed."

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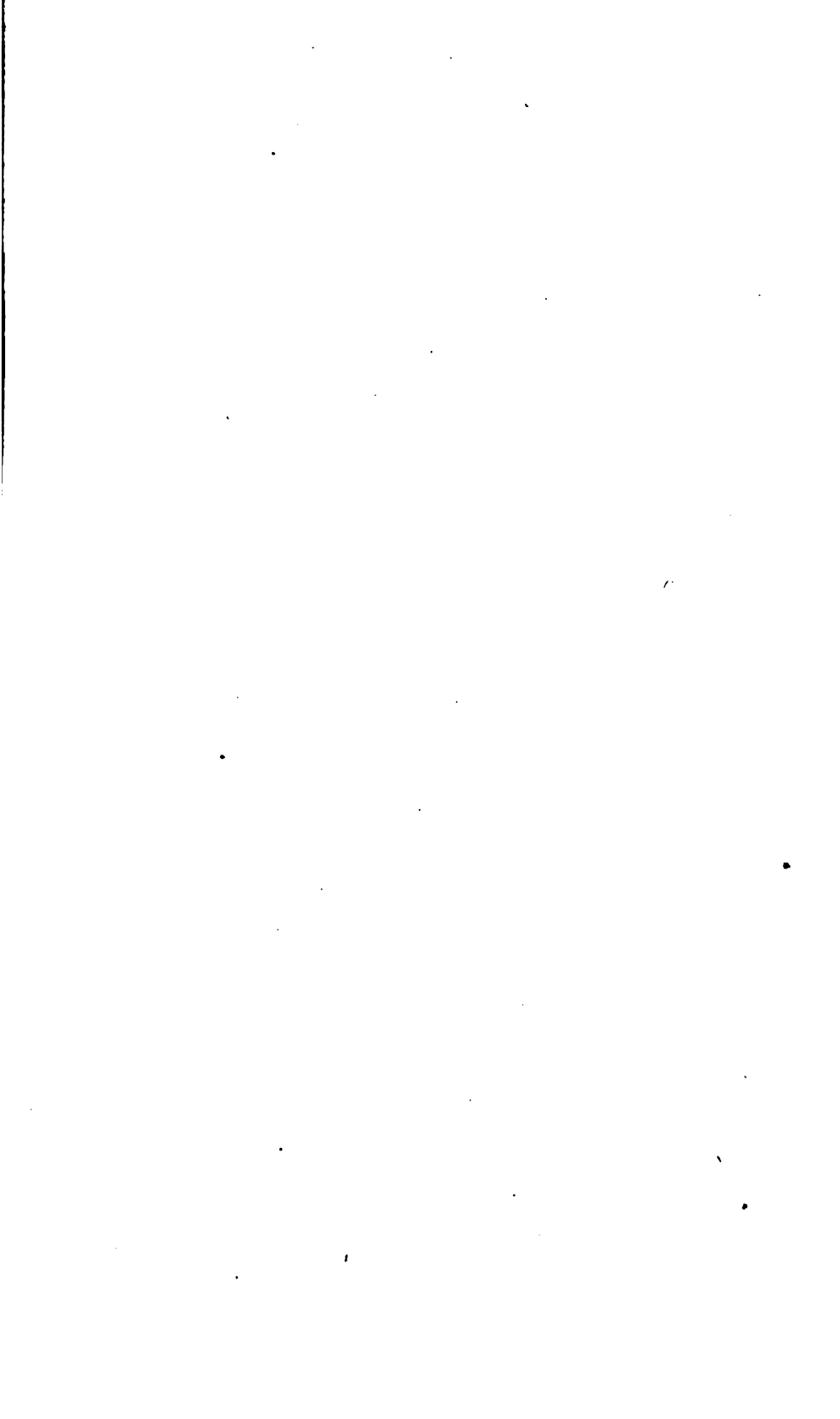
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# CIRCUIT COURT REPORTS.



CASES  
ARGUED AND DETERMINED  
IN THE  
*Circuit Courts of the United States*  
WITHIN THE SECOND CIRCUIT.

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HIRAM WALKER *vs.* CYRUS R. CRANE.

C., a provost marshal appointed under the act of March 3d, 1863, (12 *U. S. Stat. at Large*, 732, § 5.) was sued by W. for assault and battery, and false imprisonment. C. contended that he could not be held liable in a civil action for acts done by him in the discharge of the duties of his office of provost marshal: *Held*, that the action would lie;

*Held*, also, that C. had a right to order W. to leave the premises occupied officially by C. as provost marshal, and the right, if W. refused to go, to use so much force as was necessary to remove W. from such premises;

*Held*, also, that, if C. had good reason to believe, and did believe, that W., by language addressed by him to C., was threatening C. for the purpose of interfering with C. in the execution of his official duties as provost marshal, C. was justified in arresting and detaining W.;

*Held*, also, that the 4th section of said Act of March 3d, 1863, would not, of itself, bar W.'s right of action;

*Held*, also, that W., if entitled to recover, was entitled to his actual damages; and that, if C. was influenced by any motive other than the honest discharge of his official duty, the jury were at liberty to give to W. exemplary damages.

(Before SMALLEY, J., Vermont, October, 1865.)

THIS was an action of trespass for an assault and battery and false imprisonment, originally brought returnable to the County Court for the County of Chittenden and State of Vermont, by writ dated August 23d, 1864, which being returned and entered in said Court at the September Term thereof, in 1864, the defendant filed his petition for the removal of the cause to this Court, under section 5 of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 756,) and the cause was removed into this Court, and at the October Term, in 1865, of this Court, came on for trial before SMALLEY, J., and a jury, on the defendant's plea of not guilty.

On the trial, the plaintiff gave evidence tending to show, that he was, on and before the 2d of August, 1864, a manufacturer in Burlington, Vermont, and had, at that time, a man in his employ named Dike, who was liable to military duty, and whose home was in the town of Starksborough, Vermont; that the town of Starksborough was then offering to pay to any person who would, put into the United States service a substitute who should be credited to the quota of that town, the sum of \$900 as a bounty; that Dike applied to the plaintiff to assist him in obtaining a substitute, to be credited to Starksborough, so as to relieve himself from liability to draft, and to avail himself, in so doing, of the bounty offered by that town, and proposed to pay the plaintiff for his services in obtaining such substitute; that the plaintiff declined to accept any compensation, but agreed to assist Dike in obtaining the substitute; that, soon afterwards, the plaintiff was called on, at Burlington, by one Norton, of Champlain, N. Y., with whom he had no previous acquaintance, but who had been informed that the plaintiff desired to procure a substitute: that Norton was then on his way to Rutland, with three Frenchmen from Canada, with whom he had contracted that they should enlist in the United States service, and had had some correspondence with the selectmen of Rutland, relative to furnishing three men upon the quota of that town; that the plaintiff and Norton concluded an agreement that one of the men should be enlisted as a sub-



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stitute for Dike, and credited to the town of Starksborough, and that the plaintiff should pay Norton therefor the sum of \$900 when the man should be enlisted and sworn in; that, on the next day after the making of this agreement, the plaintiff accompanied Norton and the men to Rutland, for the purpose of getting the substitute for Dike enlisted and credited; that, on their arrival, some considerable discussion and negotiation took place between Norton and the authorities of Rutland, in which the plaintiff took no part, relative to a bargain for furnishing the other two men upon the quota of Rutland; [that, while this was going on, the plaintiff was called on by one N. P. Simonds, who was then engaged in and about the defendant's office, (the defendant being provost marshal,) and passing freely in and out, and who said he was a United States recruiting agent, and offered to put the substitute in for the plaintiff for \$100, and said he was the only man in Rutland who could put a substitute in through that office, and that he intended to make \$100 per head off of the men; and that plaintiff declined this proposition, but subsequently, after watching the proceedings there for some time, offered Simonds \$25 to get his man enlisted as a substitute for Dike, which offer Simonds accepted.] So much of the foregoing evidence as is included in brackets was objected to by the defendant and admitted by the Court, to which the defendant excepted. The plaintiff further gave evidence tending to show, that, soon afterwards, the men brought by Norton were taken in for examination, and, two of them having passed and been accepted, Simonds spoke to the plaintiff and told him it was all right, and to go up-stairs to the provost marshal's office and pay off his man; that the plaintiff thereupon started with the man to ascend the stairs in the United States post office building, which stairs led from the public room in the post office to the rooms in the second story occupied by the provost marshal's office, and, when he got up some distance, was met by the defendant, whom he did not then know, who took hold of his arm and asked him where he was going; that the plaintiff replied,

that he was going up-stairs with those men ; that the defendant then said : " Go down-stairs ; you are a substitute broker ! " and shoved him down three or four steps ; that the plaintiff replied : " I am not a substitute broker ; my name is Walker, from Burlington, and I came to put in a substitute for a man named Dike, from Starksborough ; " that the defendant still insisted he was a substitute broker, and shoved him down stairs again twice, three or four steps each time, till he reached the bottom ; that the plaintiff then said to him : " If you will come out of doors I will show you something ; " that the defendant asked : " What will you show me ? " that the plaintiff replied : " I will show you how a gentleman defends himself when he is assailed ; " that the defendant thereupon called one Briggs, who stood near, and ordered him to take the plaintiff to jail ; that the plaintiff enquired what he was taken to jail for, and the defendant said : " For violating the provisions of the enrolment Act, and resisting the provost marshal in the discharge of his duty ; " that Briggs took the plaintiff to the County Jail in Rutland, and imprisoned him there in the common prison, then occupied by a number of criminals and vagrants, where he remained about ten minutes ; that, while on the way to the jail, the plaintiff offered to the officer to furnish bail in any amount for his appearance at any time, which the officer declined to receive ; that, when the plaintiff had been in jail about ten minutes, the defendant sent a couple of soldiers for him, who brought him back to the post office building, and, by direction of the defendant, took him into the cellar of the building, where there were cells used for United States prisoners ; that the defendant went below and had a long conversation with the plaintiff, charging him with being a bounty broker, and with having lied to the defendant, and making other remarks of a similar character, and demanding that he should make an apology ; that, on the plaintiff's stating what his business was with the provost marshal, and that Simonds had requested him to go up-stairs, the defendant said that would make a difference, and sent for Simonds and enquired of him as to that fact, to

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which Simonds replied that he did not remember whether he had asked the plaintiff to go up-stairs or not ; that the defendant finally discharged the plaintiff from custody, saying that he did so on account of the respect he entertained for the plaintiff's father ; that the man agreed for by the plaintiff, as aforesaid, was afterwards, on the same day, enlisted as a substitute for Dike ; and that the plaintiff was sent for by the defendant to come to his office and pay the man, which he did, and also that he paid Simonds \$25 for his services. The plaintiff further testified, that he had never, in any instance, had anything whatever to do with procuring substitutes, or obtaining men for enlistment, except on this single occasion, and never had any interest or share in any such business, directly or indirectly ; and that he did not know Norton until applied to by him, as above stated, and had nothing to do with him or his recruits except to obtain the substitute for Dike, as above stated, and no interest or share otherwise in the disposal of the men, or in the money received therefor.

The defendant introduced in evidence the following documents : (1.) His commission as provost marshal, dated April 24th, 1863 : " War Department, Washington, April 24th, 1863. Sir: You are hereby informed that the President of the United States has appointed you provost marshal for the first district of the State of Vermont, with rank of captain of cavalry, in the service of the United States, to rank as such from the 24th day of April, 1863. Immediately on receipt hereof, please to communicate to this Department, through the provost marshal general of the United States, your acceptance or non-acceptance of said appointment, and, with your letter of acceptance, return the oath herewith enclosed, properly filled up, subscribed and attested, and report your age, birthplace, and the State of which you are a permanent resident. You will immediately report, by letter, to the provost marshal general, and will proceed without delay to establish your headquarters at Rutland, Vermont, and enter upon your duties in accordance with such special instructions

as you may receive from the provost marshal general. E. M. Stanton, Secretary of War. To Capt. Cyrus R. Crane, Provost Marshal first District Vermont." (2.) Special Order of the War Department, No. 221, detailing Gen. Thomas G. Pitcher as assistant to the provost marshal general for the State of Vermont, dated May 18th, 1863: "War Department, Adjutant General's Office, Washington, May 18th, 1863. Special Orders, No. 221. [Extract.] \* \* \* \* \* Brigadier General Thomas G. Pitcher, U. S. Volunteers, will proceed without delay to Montpelier, Vermont, and enter upon the duties of assistant to the provost marshal general of the United States, for the State of Vermont. \* \* \*

\* \* By order of the Secretary of War. E. D. Townsend, Assistant Adjutant General." (3.) Revised Regulations issued by the War Department, May 1st, 1864, for the government of the bureau of the provost marshal general, particularly sections 1, 2, 19, 22, 24, 27 and 32: "Sec. 1. The officer detailed in each State or division to aid the War Department in securing uniformity in the execution of the enrolment Act, shall keep himself well informed as to the condition of the department throughout the State or division. He shall, under the provost marshal general of the United States, exercise supervision over the provost marshals and their subordinates, for the Congressional districts of that State or division, and shall see, by personal inspection, or by his inspectors, that boards of enrolment, and persons acting under them, attend faithfully and diligently to their duties. Sec. 2. He shall communicate to them the orders and instructions of the provost marshal general, and see that they are promptly and efficiently executed, and shall, from time to time, give or transmit such instructions, in accordance with these regulations, as hereinafter prescribed, as may be required to facilitate and enforce obedience to them. Sec. 19. Immediately upon entering upon his duties, each provost marshal shall report, by letter, to the provost marshal general of the United States, and the acting assistant provost marshal general of his State. Sec. 22. (Section 7 of the Act for enrolling and

calling out the national forces, approved March 3d, 1863—that it shall be the duty of the provost marshals to obey all lawful orders and regulations of the provost marshal general, and such as may be prescribed by law, concerning the enrolment and calling into service of the national forces.) Sec. 24. It shall be the duty of the provost marshal in each district to call together, when required, the board of enrolment, to preside at its sessions, announce such of its decisions or directions as it may be necessary to make public, enforce its orders, see that a fair record is made of its proceedings, in a book kept for that purpose by the recorder, and to transmit to the provost marshal general the enrolment lists, as consolidated by the board, and such other communications as the board may deem it necessary to lay before the provost marshal general. Sec. 27. He shall arrest and forthwith deliver to the proper civil authorities, to wit, the marshal of the United States within and for the district in which the arrest is made, with written charges in the case, all persons who shall have violated section 12 of the Act amendatory of the enrolment Act, or any part of the same. Sec. 32. To enable provost marshals to discharge their duties efficiently, they are authorized to call upon the nearest available military force, or on citizens, as a *posse comitatus*, or on United States marshals and deputy marshals; and these and all other persons are hereby enjoined to aid the provost marshal in the execution of his lawful duties, when called on so to do.” (4.) Regulations from the War Department, dated September 29th, 1863, particularly section III: “III. Persons deputized as aforesaid, to arrest deserters and procure recruits, presenting to your board a man acceptable as a recruit, according to the present ruling of acceptability, as applied by this bureau, shall receive premiums as follows, to wit: for an accepted recruit who may be shown to the board to have served at least nine months as a soldier, and been honorably discharged (for other cause than disability), a premium of \$25; for an accepted recruit without the military qualifications above specified, a premium of \$15. The premiums herein provided will

be paid to the persons who shall have presented the accepted recruit, as soon as said recruit shall have been delivered at the general rendezvous at . The payment of the premium will be made by in the , whenever the person who furnished the recruit shall present to him a certificate from your board that the recruits named, and for whom he claims premiums, were accepted and regularly enlisted, and a certificate from the commanding officer at the general rendezvous at , that the said recruits have actually been received at his rendezvous. You are authorized and required, notwithstanding anything else herein contained, to decline all business, in the matter of recruits, with any person or persons who may at any time practice, or attempt to practice, fraud or imposition, either upon the Government or the person presented as a recruit, or who shall extort, claim, or receive any other fee, perquisite, or compensation from the Government, or the recruit, than the premium herein authorized and provided, and such persons shall forfeit their appointments, and all right to any premiums or payments, and be reported to the provost marshal general, to be dealt with summarily by a military commission. You are required to facilitate the procurement of recruits in the manner herein prescribed, by early examination of them, prompt preparation of certificates upon which the payments of premiums depend, and by everything else properly devolving on you, calculated to assist the persons presenting recruits in securing their premiums without unnecessary delay. You will immediately nominate, through the acting assistant provost marshal general of the State, one or more persons whom you deem best suited for recruiting agents for your district, that they may be deputized for that purpose." (5.) Circular No. 28, dated June 16th, 1863, from the office of the provost marshal general: "War Department, provost marshal general's office, Washington, D. C., June 16th, 1863. [Circular No. 28.] The following opinion of Hon. William Whiting, solicitor of the War Department, has been ordered to be published by the Secretary of War: Opinion. It is made the duty of the

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provost marshals to obey all lawful orders and regulations of the provost marshal general, and such as may be prescribed by law, concerning the enrolment and calling into service of the national forces. (Act, March 3d, 1863, section 7.) The 25th section of the same Act provides, that, if any person shall resist any draft of men enrolled under this Act into the service of the United States, or shall counsel or aid any person to resist any such draft, or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto, or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted men not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding \$500, or by imprisonment not exceeding two years, or by both of said punishments. To do any act which will prevent or impede the enrolment of the national forces (which enrolment is preliminary and essential to the draft), is to prevent or impede the draft itself. The enrolment is a 'service to be performed by the provost marshal in relation to the draft.' It is not the act of drawing ballots out of a ballot box itself, but it is 'in relation to it,' and is the first step that must by law be taken preparatory to draft. It is, therefore, clearly within the duty of the provost marshal to subject all persons who obstruct the enrolment, the meeting of the board, or any other proceeding which is preliminary and essential to the draft, to summary arrest, according to the provisions of section 25. There are many ways of obstructing officers in the performance of their 'services or duty in making, or in relation to, the draft,' without employing physical force. The neglect or refusal to do an act required by law to be done, may itself be such an 'obstruction' as to subject the offender to arrest. Suppose a person be found standing in a passage through which the drafting officers were required to enter into a place designated by law as the place for

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draft, and suppose that his standing in that place would prevent access by these officers to the place of draft. If they request him to move away, and he neglects or refuses so to do, for the purpose of preventing the draft, the non-performance of the act of removal would be itself an 'obstruction of the draft, or of an officer in the performance of his duty in relation to it.' Standing mute in civil courts, is, under certain circumstances, a punishable offense; and so, if a person, with intent to prevent the draft, refuses to give his true name when lawfully requested so to do by an officer whose legal duty is to ascertain and enrol it, it is an obstruction of that officer in the performance of one of his duties in relation to the draft. So, also, of the giving of false names with the same illegal intent, and the offender will, in either case, be subject to summary arrest by the provost marshal. William Whiting, Solicitor of the War Department. James B. Fry, Provost Marshal General." This paper was objected to by the plaintiff, and was received by the Court subject to the objection. (6.) The call of the President for 500,000 men, dated July 18th, 1864: "War Department, Adjutant General's Office, Washington, July 19th, 1864. For five hundred thousand volunteers. By the President of the United States of America—A Proclamation. Whereas, by the Act approved July 4th, 1864, entitled, 'An Act further to regulate and provide for the enrolling and calling out the national forces, and for other purposes,' it is provided, that the President of the United States may, 'at his discretion, at any time hereafter, call for any number of men, as volunteers, for the respective terms of one, two, and three years, for military service,' and 'that, in case the quota, of [or] any part thereof, of any town, township, ward of a city, precinct, or election district, or of a county not so subdivided, shall not be filled within the space of fifty days after such call, then the President shall immediately order a draft for one year, to fill such quota, or any part thereof, which may be unfilled;' and whereas the new enrolment heretofore ordered is so far completed as that the aforementioned Act of Congress may now be put in opera-



tion, for recruiting and keeping up the strength of the armies in the field, for garrisons, and such military operations as may be required for the purpose of suppressing the rebellion, and restoring the authority of the United States Government in the insurgent States: Now, therefore, I, Abraham Lincoln, President of the United States, do issue this my call for five hundred thousand volunteers for the military service, provided, nevertheless, that this call shall be reduced by all credits which may be established under section eight of the aforesaid Act, on account of persons who have entered the naval service during the present rebellion, and by credits for men furnished to the military service in excess of calls heretofore made. Volunteers will be accepted under this call for one, two, or three years, as they may elect, and will be entitled to the bounty provided by the law for the period of service for which they enlist. And I hereby proclaim, order, and direct, that, immediately after the 5th day of September, 1864, being fifty days from the date of this call, a draft for troops to serve for one year shall be had in every town, township, ward of a city, precinct, or election district, or county not so subdivided, to fill the quota which shall be assigned to it under this call, or any part thereof which may be unfilled by volunteers on the said 5th day of September, 1864. In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the city of Washington, this eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth. [L. s.] Abraham Lincoln. By the President, William H. Seward, Secretary of State. By order of the Secretary of War, E. D. Townsend, Assistant Adjutant General." (8.) Proclamation of the President suspending the privilege of the writ of *habeas corpus*, dated September 15th, 1863: "War Department, Provost Marshal General's Office, Washington, D. C., September 17th, 1863. The Secretary of War orders that the following Act of Congress, and Proclamation of the President based upon the same, be published for the

information of all concerned, and that the special instructions hereinafter contained for persons in the military service of the United States, be strictly observed. 'An Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases, approved March 3d, 1863. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof; and, whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by authority of the President; but, upon the certificate, under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of *habeas corpus* shall be suspended by the judge or Court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue.' 'By the President of the United States.—A Proclamation. Whereas, the Constitution of the United States has ordained that the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it; and whereas, a rebellion was existing on the third day of March, 1863, which rebellion is still existing; and whereas, by a statute, which was approved on that day, it was enacted by the Senate and House of Representatives of the United States in Congress assembled, that, during the present insurrection, the President of the United States, whenever, in his judgment, the public safety may require, is authorized to suspend the privilege of the writ of *habeas corpus* in any case, throughout the United States, or any part thereof; and whereas, in the judgment of the President, the public safety does require that the privilege of the said writ shall now be sus-

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pendent throughout the United States, in the case when, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled, drafted, or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the Rules and Articles of War, or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offence against the military or naval service: Now, therefore, I, Abraham Lincoln, President of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the writ of *habeas corpus* is suspended throughout the United States, in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion, or until this Proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked. And I do hereby require all magistrates, attorneys, and other civil officers within the United States, and all officers and others in the military and naval service of the United States, to take distinct notice of this suspension, and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly, and in conformity with the Constitution of the United States and the laws of Congress in such case made and provided. In testimony whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed, this 15th day of September, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States of America the eighty-eighth. [L. s.] Abraham Lincoln. By the President, William H. Seward, Secretary of State.' The attention of every officer in the military service of the United States is called to the above Proclamation of the President, issued on the 15th day of September,

1863, by which the privilege of the writ of *habeas corpus* is suspended. If, therefore, a writ of *habeas corpus* should, in violation of the aforesaid Proclamation, be sued out and served upon any officer in the military service of the United States, commanding him to produce before any Court or judge any person in his custody by authority of the President of the United States, belonging to any one of the classes specified in the President's Proclamation, it shall be the duty of such officer to make known by his certificate, under oath, to whomsoever may issue or serve such writ of *habeas corpus*, that the person named in said writ 'is detained by him as a prisoner under authority of the President of the United States.' Such return having been made, if any person serving, or attempting to serve, such writ, either by the command of any Court or judge, or otherwise, and with or without process of law, shall attempt to arrest the officer making such return, and holding in custody such person, the said officer is hereby commanded to refuse submission and obedience to such arrest, and if there should be any attempt to take such person from the custody of such officer, or arrest such officer, he shall resist such attempt, calling to his aid any force that may be necessary to maintain the authority of the United States, and render such resistance effectual. James B. Fry, Provost Marshal General." (9.) Letter from the provost marshal general to the defendant, approving N. P. Simonds' appointment by the defendant as recruiting agent: "War Department, Provost Marshal General's Office, Washington, D. C., October 13th, 1863. Captain C. R. Crane, Provost Marshal, 1st District of Vermont, Rutland, Vt. Captain: I am directed by the provost marshal general to acknowledge receipt of your communication of the 1st inst., nominating N. P. Simonds and George Hopkins as recruiting agents, and to say, in reply, that their nomination is approved. I am, captain, very respectfully, your obedient servant, Henry Stone, Ass't Adj't General."

The defendant further gave evidence tending to show that General Pitcher had acted under his said appointment as

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assistant provost marshal general for Vermont, from the date thereof, and had received and communicated to the defendant officially, as instructions, papers 3, 4 and 5, above mentioned; that the defendant had received a verbal order from General Pitcher, to exclude from his office all bounty brokers and other persons not having proper business with the office, and to arrest them in case of threats or refusal to obey orders; that the defendant had acted as provost marshal, under his said appointment; from the date thereof, having his office at Rutland, in the building belonging to the United States, and occupied as a United States court house and post office, under a cession of the State of Vermont, under an Act entitled "An Act ceding to the United States exclusive jurisdiction over a site for a court house and post office in the towns of Rutland and Windsor," approved November 18th, 1856; that he occupied two rooms therein, one below for the examination of recruits, and one in the second story for the general business of the office, the communication between which was the staircase before mentioned, leading from the public room in the post office; that it was necessary for him frequently to pass up and down between the two rooms; that there were usually a good many people there having business with his office; that such was the case on the day of the transaction in question; and that he was then engaged in correcting the enrolment and receiving recruits. The defendant testified further, that, after the men above referred to had been examined and passed, and had gone up stairs to be sworn in, he overtook the plaintiff on the stairs, going up; that he asked the plaintiff if he had any business at the office, and he replied that he had not; that the defendant then told him the office was very much crowded, and they were very busy, and he wanted him to go down stairs; that the plaintiff did not move to go, and the defendant said: "You are a substitute broker, and my orders are not to allow one in or about my office, and I want you to go down these stairs, and now;" that the plaintiff replied: "I am Hiram Walker, of Burlington;" to which the defendant replied: "I know who you are, and have known

you before," and then shoved the plaintiff down stairs, two or three stairs at a time, the plaintiff stopping and clinging to the railing; that the plaintiff then said: "If you will come out here, Capt. Crane, I will settle this with you;" that defendant asked him what he would do, and he replied that he would defend himself; that the defendant then arrested him, and, to his inquiry what he was arrested for, replied, for threatening the defendant in the discharge of his official duties; and that the defendant called on Levi Briggs, a deputy sheriff, to take the plaintiff to jail, and, on the plaintiff's inquiring by what authority, the defendant said, by virtue of the enrolment Act and his instructions to arrest those who threatened him in the performance of his duties. The defendant further testified, that he understood the above language of the plaintiff to convey a threat, and feared the plaintiff would assault him when he should afterwards be passing up and down in the course of his business. He further testified, and gave evidence tending to show, that the plaintiff had been pointed out to him as a bounty broker, and as the one who had come with the three men above named, and that, at the time of the assault, he supposed the plaintiff was a bounty broker. In this connection he offered to prove that there was a brother of the plaintiff who was a bounty broker, and that he supposed this to be the man. This offer was objected to by the plaintiff, and excluded by the Court, to which the defendant excepted. The defendant, also, introduced the said Simonds as a witness, who testified, that the plaintiff did, in fact, attempt to negotiate with the authorities of Rutland for furnishing the other men brought by Norton, to be applied on the quota of that town, and professed to have an interest in the disposition of the men. Said Simonds, also, denied that he told the plaintiff that he was the only man who could put in a recruit through that office, or offered to put the man in for \$100, and testified, that he told the plaintiff he could go and put the man in himself, and he would be well received, but that the plaintiff declined to do so, and offered him \$25 to do the business. He further testified, that he was appointed

a United States recruiting agent in 1863, receiving a premium under the regulations of the War Department, of September 29th, 1863, which premium was taken away in July, 1864, but that his appointment was not revoked until September, 1864, and that he continued, up to that time, to act as recruiting agent, and acted in connection with the provost marshal's office, and was employed by the town of Rutland to assist in filling its quota. On cross-examination of Simonds, the plaintiff sought to prove by him, that he was himself, both before and after the 3d of August, 1864, largely engaged in business at that office, as a bounty and substitute broker, and engaged in procuring and furnishing recruits for towns and individuals, under contract, by which he received one sum for the recruit furnished, and paid the recruit a less sum; that he, in some instances, received from the towns the bounties voted by them for recruits, and then obtained the recruits as cheap as he could; that he made from \$50 to \$250 each, on the men he so furnished, by receiving as their bounties that amount more than he paid the recruits; that he had proposed to various persons, namely, to one William Walker, and one Artemas Powers, to go into partnership with them in the business of substitute and bounty brokers, at that office; that he had been in partnership with one Shute, of Boston, in the business of furnishing naval recruits at the defendant's office, for which he received \$1,000 each, and paid Shute \$900; that he was, also, in the habit of receiving from towns and individuals liable to furnish recruits and substitutes, and bringing suitable men there to be enlisted for that purpose, from \$25 to \$100 per man for his services in getting them accepted and enlisted, and had received these fees in many instances, and received \$50 from Norton for his services in getting accepted the other men brought by him on this occasion, who were enlisted; that, during all this time, he had free access to, and intimate communication with, the defendant's office; that, in one or two instances, where parties bringing men had refused to pay him, their men had been rejected on the ground that enough of the bounty to be received was not to be paid to the

recruit ; and that it was known to the defendant that Simonds was so acting as a substitute and bounty broker, as aforesaid, and receiving premiums and compensations, as aforesaid, during the time he was so acting. To these inquiries, and to the offer to prove these facts, the defendant objected, but the inquiries were permitted by the Court, and the defendant excepted, and the answers and the testimony of the witness tended to prove the foregoing facts. But the witness denied, as did, also, the defendant, that the defendant received any share of the money so derived ; and Simonds further stated, that the difference between himself and a bounty broker was, that his proceedings were approved by the Department. The defendant, on his cross-examination, stated, that he considered a bounty broker to be one who was engaged in obtaining and furnishing recruits at a profit, and who was not vouched for to him ; if vouched for, he should not regard him as a bounty broker ; and if vouched for by Simonds, it would be sufficient. Gen. Pitcher, upon his cross-examination, testified, that, after the call for 500,000 men above referred to was made, the recruiting agents received nothing from the Government ; that he (Gen. Pitcher) never authorized them, after that, to receive anything from individuals or from towns ; that, after the order of July 19th, 1864, they were forbidden to receive any such payments ; that he knew nothing of Simonds, except that he was a recruiting agent ; and that anything he did after the 19th of July, 1864, by which he received pay of towns or others, was a matter entirely between him and them.

The plaintiff, in reply, introduced further evidence tending to corroborate his statement of the conversation that took place between him and the defendant on the stairway, at the time of the assault, and to contradict the statement of that conversation given by the defendant, and also denied, and gave evidence tending to disprove, the statement of Simonds, both as to the conversation between him and the plaintiff, and as to the plaintiff's taking any part in the disposition of the other men brought by Norton, and claiming to have any in-



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terest in, or connection with, them; and also denied, and gave evidence tending to disprove, the statement that he knew the defendant, or called him by name, at the time of the assault.

The defendant claimed as the law of the case, and requested the Court to instruct the jury (1.) that the defendant was protected by the provisions of section 4 of the Act of Congress, approved March 3d, 1863, entitled "An Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," (12 *U. S. Stat. at Large*, 756), and that the Court should direct a verdict for the defendant; (2.) that, upon the evidence, and the law applicable to the case, the justification of the defendant was made out, and that the jury be instructed to return a verdict for the defendant; (3.) that, if the jury should find that the defendant, in the making of the assault, and in the arrest and imprisonment, acted in good faith and without malice, and in the performance of the duties of his office, in obedience to superior orders, as then understood by him, and then publicly proclaimed, the jury should return a verdict for the defendant; (4.) that if the jury should find as in point 3, the plaintiff could not recover on the first count of his declaration; (5.) that, if the jury should find that the defendant had good reason to believe, from the conduct of the plaintiff, and from the information which had been communicated to the defendant, that the plaintiff was a bounty broker, and that the defendant did so believe, the defendant, under his orders, was not liable to the plaintiff, in this action, for treating him as a bounty broker and excluding him from the approaches to the defendant's office; (6.) that it was not necessary to the defendant's justification of the assault upon the stairs, that he should have announced to the plaintiff who he was, or his authority for ejecting the plaintiff. The plaintiff's counsel having remarked to the jury, in the opening, that the case was one of great public importance, involving the vindication of the private rights and liberty of the citizens against arbitrary military power, in comparison with which the plaintiff's individual injury became insignificant, and that,

in the assessment of damages, this consideration should be attended to, and contribute to enhance them, the defendant further requested the Court to instruct the jury, that this consideration was not an element which they should regard as going to increase the damages.

The Court charged the jury upon the points involved in the requests, as follows—that there were certain facts about which there was but little, if any, dispute; that the defendant was a provost marshal, and had an office in a building which belonged to the United States, and, at the time of the transaction out of which this controversy grew, was engaged in the performance of his official duties therein; that the plaintiff wanted to have a person enlisted as a substitute for one Dike, and that he went to Rutland, and started to go up into the defendant's office, aforesaid, for that purpose, and was pushed or forced down by the defendant; that, after he got to the bottom of the stairs, the plaintiff said to the defendant, while still in the building: "If you will come down here, I will show you how I will defend myself," or words to that effect; that the defendant then told one Briggs, who was standing near, and a deputy sheriff, to arrest the plaintiff and commit him to jail, and that said Briggs did so, where the plaintiff was confined a few minutes, when the defendant sent two soldiers for him, took him out of jail, and brought him back to the building from which he was first taken, when a conversation ensued between the defendant, the plaintiff, and one Simonds, which ended by the defendant's telling the plaintiff that he might go, and ordering him to be released; and that the defendant claimed that the civil law had been suspended in Vermont, in cases like this, and that martial law had been substituted therefor, and, that if the defendant was wrong, he should be tried by court martial. The Court, after explaining the difference between civil law and martial law, told the jury, that this claim of the defendant was unfounded, that the civil law was still in force in Vermont, and that, although the defendant was an officer in the military service of the United States, and claimed to be acting in his official capacity, the

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plaintiff had a right to seek redress for wrongs or injuries such as he claimed to have sustained in this case from the defendant; that, if the jury found, from all the evidence, that, when the plaintiff and the defendant met on or at the top of the stairs, as described, the defendant told the plaintiff to go down, that he did not want him there, and the plaintiff refused or declined to go, the defendant had the legal right to use so much force as was necessary to put him down; that, if the defendant had good reason to believe, and actually did believe, that what was said and done by the plaintiff after he was pushed to the bottom of the stairs, was intended to be or was a threat or menace for the purpose of interfering with the defendant in the execution of his official duties as provost marshal, or in any way to deter him therefrom or molest him therein, the defendant was justified in ordering his, the plaintiff's, arrest and detention in the manner stated by the witnesses; and that the jury, in coming to a conclusion upon that question, should carefully consider all the circumstances, as they appeared from the testimony and the surroundings of the parties at the time, and, if they were satisfied that such language and conduct of the plaintiff did amount to such threat or menace as before described, they would return a verdict for the defendant. The Court further instructed the jury, that the 4th section of the Act of Congress, approved March 3d, 1863, would not, as claimed by the defendant's counsel, of itself protect the defendant, or bar the plaintiff from his right of action, provided the jury found the facts to be as claimed by the plaintiff, as before stated, and, for this trial, the Court charged, that that section was inoperative, and afforded no defence; that if, under these instructions, the jury should find a verdict for the plaintiff, they were bound to give him his actual damages, and, if they should think the case required it, they might give him exemplary damages; that, upon this point, they should carefully examine all the evidence in the case, and the arguments of counsel thereon, and if, after full consideration, they found that the defendant, in causing the arrest and imprisonment of the plaintiff, was influenced

by any motive other than the honest discharge of his official duty, they were at liberty to consider it in making up the verdict; that this question was peculiarly within their province; and that, if they found for the plaintiff, they would award him such damages as they thought justice required.

To the refusal of the Court to charge as the defendant requested, and to the charge as made, the defendant excepted. The jury returned a verdict for the plaintiff for \$1,000 damages.

The District Attorney was directed by the Attorney General of the United States to bring and prosecute a writ of error, in behalf of the defendant, from the judgment of the Court, with the consent of the defendant. This was done, and the Supreme Court of the United States affirmed the judgment.

*George F. Edmunds, Edward J. Phelps and Andrew Tracy*, for the plaintiff.

*Dudley C. Denison, (District Attorney,) Daniel Roberts and John Prout*, for the defendant.

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JOHN J. MYERS

*vs.*

SENECA M. DORR AND THE SUTHERLAND FALLS MARBLE  
COMPANY. IN EQUITY.

M., a copartner with D., filed a bill against D. for a dissolution of the copartnership, and an account. The firm had a contract with the S. Co., a corporation, in regard to the furnishing by it to the firm of marble. A receiver of the copartnership property was appointed. Afterwards, M. filed an amend-

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ment and supplement to the bill, alleging a secret agreement by D. with the S. Co., in fraud of the rights of M. under said contract, and the refusal of the S. Co. to furnish marble to the receiver, and making the S. Co. a defendant, and praying a specific performance of said contract by it. M. was a citizen of Ohio. The bill alleged that the S. Co. was a citizen of Vermont. The S. Co. interposed a plea to the jurisdiction of the Court over it, alleging that it was a corporation created by Massachusetts. Issue was joined on the plea, and proofs were taken, and the cause was heard thereon, as to the S. Co.: *Held*, that the Court had no jurisdiction of the suit as to the S. Co.

Where a plaintiff in equity, instead of setting down the defendant's plea for argument, replies to it, he admits its sufficiency as a defence, if the facts it alleges shall be established.

A corporation can have no citizenship or inhabitancy out of the State by which it was created, and, under § 11 of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 78,) cannot be made a party to a civil suit, in a Circuit or District Court, by original process, in any other District than a District of the State by which it was created.

One who purchases *pendente lite* the interest of a defendant in the subject-matter of a suit, does not thereby become a necessary party to the suit; and, if the Court has no jurisdiction of him, he cannot be compelled to come in as a party.

As to the S. Co. the amended and supplemental bill is an original bill.

(Before WOODRUFF and SMALLEY, JJ., Vermont, October Term, 1870.)

THE bill of complaint herein, filed in October, 1869, alleged a copartnership between the plaintiff, a citizen of Ohio, and the defendant Dorr, a citizen of Vermont, stated various facts as grounds for a dissolution of such copartnership, and prayed a decree declaring such dissolution and directing an account, a disposition of the copartnership property, and a distribution, &c. The copartnership was formed for the purpose of sawing and selling marble, and the firm were owners of mills, machinery, &c., used in their business. The firm also held a contract with the Sutherland Falls Marble Company, by which the latter, upon certain terms therein specified, agreed to furnish to the firm marble in blocks, to be sold, and gave them the right to hold and use certain mills and property of the said company. Such contract contained a provision that no assignment thereof should be made by the firm without the consent of the Marble Company. After the filing of the bill a receiver of the copartnership property was

appointed. In the October term, 1869, the plaintiff filed what was termed an amendment and supplement to his bill of complaint, alleging that the defendant Dorr had, in September, 1869, entered into a secret agreement or understanding with The Sutherland Falls Marble Company, in fraud of the plaintiff, under said contract, or in modification thereof, the object of which was to depreciate the value of the interest of the latter in the contract for the supply of marble to the firm, and embarrass the business of the firm; that the said company had, since the appointment of the receiver herein, and in pursuance of such fraudulent agreement with Dorr, by notice in writing, refused to supply marble under such contract, and called on the plaintiff to vacate and deliver up the quarries and other property of said company, on the ground that the appointment of such receiver operated as an assignment of the contract, in violation of the provisions thereof; and that said company had, since the said notice, discontinued the supply of marble, and refused to continue the same, although the receiver desired, and was ready to proceed with, the execution of the said contract. It then averred that great injury to the plaintiff and to the business, and great embarrassment to the receiver, would ensue, if marble were not supplied to the firm or its receiver, for the purpose of maintaining and preserving the business. Thereupon the plaintiff insisted that he was entitled to a decree for a specific performance of the said contract by the said Marble Company, and to an injunction restraining any further acts, &c., tending to discharge, modify or suspend the said contract; that the giving of such notice was a contempt of this Court; and that the said Sutherland Falls Marble Company ought to be made a party to this suit. This bill further alleged, that the said Marble Company was organized for the sole purpose of quarrying marble in the State of Vermont; that its quarries, property, business and principal office were in that State; that a part of its directors and stockholders, and its general agent, resided in that State; that the company had likewise a charter obtained from the Legislature of the State of Vermont; and that it

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was a citizen of said State of Vermont. Wherefore the complaint prayed relief as aforesaid, and that the company might be decreed specifically to perform their contract, and be enjoined from suspending business or the supply of marble under the contract, &c., with a prayer for process against the said company, &c.

The Sutherland Falls Marble Company, appearing specially and only for the purpose of objecting to the assumption of any jurisdiction of that company by this Court, interposed a plea to the jurisdiction, wherein it was alleged, that the said company was not organized for the sole purpose of quarrying marble in the State of Vermont; that its property was not solely in that State; that it had not, and never had had, any charter obtained from the Legislature of that State, and, if any person or persons had obtained from that Legislature any act of incorporation under the same name or a similar name, it was without the knowledge or consent of such defendant, and such defendant had never adopted or acted under it; and that such defendant was not, in any sense, a citizen of the State of Vermont, but was a corporation organized and established within and by the laws of the State of Massachusetts only, and had its locality, residence and citizenship solely in Massachusetts, and had no residence, citizenship or locality within the State of Vermont.

Upon this plea the plaintiff took issue, averring that the said plea and the several matters and things therein pleaded and therein set forth were not true. Proofs were taken, and, upon the bill and supplement, plea and proofs, the cause was heard as to the said Sutherland Falls Marble Company.

*Edward J. Phelps*, for the plaintiff.

*Isaac F. Redfield*, for the defendant.

WOODEUFF, J. The single question presented by the pleadings in this suit, as now brought before us, is, whether the facts alleged by the Sutherland Falls Marble Company

in their plea, are proved. The complainant has thought proper, by replying to the plea, to put its averments in issue. The rule is elementary, and is well settled, that, when a complainant in equity, instead of setting down the defendant's plea for argument, to test its sufficiency, elects to reply thereto, denying the facts alleged, he admits its sufficiency both in form and substance, as a defence to all the matter of the bill to which it is pleaded, and that, if the facts shall, upon the proofs taken, be found established, the bill must be dismissed, (*Story's Eq. Pl.*, § 697; *Ex'rs of Gallagher v. Roberts*, 1 Wash. C. C. R., 320; *Hughes v. Blake*, 6 Wheat., 453; *Rhode Island v. Massachusetts*, 14 Pet., 210, 257;) and this must be done without reference to any equity arising from other facts stated in the bill.

There is no occasion to discuss the evidence. The proofs taken to sustain the allegations of the plea are uncontradicted by any evidence produced on the part of the complainant. Indeed, we do not understand the counsel for the complainant to claim that those facts are not established. The plea is to the jurisdiction of the Court over the defendant corporation. By replying, the complainant admits the sufficiency of the facts alleged, to support the plea. The allegations of the plea are proved, that is to say, it is proved that the corporation was not organized for the sole purpose of quarrying marble in Vermont, and has property without that State; and that it has never had or adopted or acted under any charter granted by the Legislature of that State, and is not a citizen of that State, but, on the contrary, is a corporation organized and established within and by the laws of the State of Massachusetts only.

It is quite too late to insist that the residence or citizenship of a director or stockholder of a corporation in another State than that by which it was created, changes or affects its citizenship. Whatever was formerly held on that subject to the contrary, it is now well settled, that a corporation can have no citizenship or inhabitancy out of the State wherein it was created; and this has become too familiar to require that we



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should refer to the numerous modern cases to that effect. We might therefore, with great propriety, stop here, and say the defendant has established the plea, and is, therefore, entitled to a decree dismissing the bill. The discussion, upon the hearing, had a much broader range. The counsel for the complainant treated the hearing as if it were upon a demurrer to the plea, insisting that the facts alleged therein and proved did not show a want of jurisdiction, and that, in considering that question, the Court should regard every fact alleged in the bill, which the plea does not deny, as true. What we have above said, is in direct denial that the complainant is at liberty to raise any question touching the sufficiency of the plea. But, if we should pursue the subject, and consider the views urged upon us, the result to the complainant must be the same.

The defendant is a corporation created by or under the laws of the State of Massachusetts, and has no other residence or inhabitancy. The Judiciary Act of 1789, § 11, (1 *U. S. Stat. at Large*, 78,) is express, that no civil suit shall be brought before a Circuit or District Court, against an inhabitant of the United States, by any original process, in any other District than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. In respect to the question of jurisdiction, a corporation is to be treated, *pro hac vice*, as a natural person. (*Clarke v. N. Y. Steam Nav. Co.*, 1 *Story*, 531; *Day v. Newark Ind. R. Co.*, 1 *Blatchf. C. C. R.*, 628.) Such corporation cannot be found out of the State wherein it is created, within the meaning of the statute, and be served by or through its officers. (*Pomeroy v. The N. Y. & N. H. R. R. Co.*, 4 *Blatchf. C. C. R.*, 120.) To the general rule declared by the statute, see *Toland v. Sprague*, (12 *Pet.*, 300;) *Picquet v. Swan*, (5 *Mason*, 35;) *Richmond v. Dreyfous*, (1 *Sumn.*, 131,) and the other cases cited above; and the case of *Minnesota Co. v. St. Paul Co.*, (2 *Wallace*, 609,) relied upon by the complainant as creating an exception, affirms the general rule. And yet here the Sutherland Falls Marble Company is sued and required to answer in the Dis-

trict of Vermont. The Circuit Court of that District has no jurisdiction to compel that corporation to appear and answer, and the repeated decisions of the Supreme Court, that no decree can be pronounced which shall affect the rights of a party who is out of the jurisdiction, show that no decree can be pronounced against this defendant. (*Story v. Livingston*, 13 *Pet.*, 359; *Coiron v. Millaudon*, 19 *How.*, 113; *Shields v. Barrow*, 17 *How.*, 130; *No. Ind. R. R. Co. v. Mich. Cent. R. R. Co.*, 15 *Id.*, 233; *Barney v. Baltimore City*, 6 *Wallace*, 280.)

In order to sustain the jurisdiction, the counsel for the complainant insists that the Sutherland Falls Marble Company have, since this suit commenced, purchased the interest of the defendant Dorr in the contract with them; and this is claimed to be a submission to the jurisdiction, and to make them substantially parties to the suit. In the first place, the fact alleged is not proved, and we are constrained so to find, upon the evidence. In the next place, if proved, it could not affect the question. A purchaser *pendente lite* may be said to submit to the jurisdiction, but in this sense only—he purchases subject to the litigation; but the litigation may proceed without noticing his purchase, and he does not, by such purchase, become a necessary party. If the Court have not jurisdiction of him, he cannot be compelled to come in as a party. And, once more, it is claimed to be essential to the rights of the complainant, and to the protection of the business now in the hands of the receiver, and its successful prosecution, that the complainant should have the relief against the Marble Company sought by the supplemental bill. A short answer might be given to this. The complainant or the receiver must seek that relief in a Court having jurisdiction of the party against whom it is sought. The circumstance that such relief would be beneficial to the parties, and prevent incidental loss to them, pending the prosecution of the original bill, will not warrant or create any extension of the power of the Court.

We forbear to remark upon the extraordinary character of the whole case now before us, in which a complainant who

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has commenced a suit to dissolve a copartnership and adjust its affairs with his partner, seeks, by what he calls a supplemental bill, to compel a third party, who has no interest in the copartnership, specifically to perform an agreement made with the firm; and that is just what is sought against this defendant. As to him the bill is, in every just sense, an original bill. If the complainant can maintain such a suit upon the contract in question, he must prosecute it where the Court has jurisdiction, and the attempt to unite it with a controversy with his partner touching their copartnership affairs, cannot avail anything. And so, also, the receiver of the copartnership property, if, in virtue of his receivership, he can sue on the contract, or if he can maintain a suit for its specific performance, must prosecute it elsewhere. Arguing that it is important that this Court should have jurisdiction of this defendant, in order to do full justice and protect all parties, will not avail to confer jurisdiction, where the limitation imposed by statute and settled by adjudication forbids its exercise.

We have referred to the nature of the suit for the purpose of adding, that the case of *Minnesota Co. v. St. Paul Co.*, (2 Wallace, 609,) touches no question here discussed. There, a suit was rightly brought and was decided, the Court having jurisdiction of the parties, a decree was made, it was found that certain orders made in execution of the decree were invalid by reason of a change in the jurisdiction of the Court, and that further adjudication was necessary in order to the execution of the decree and the disposal of the property in the hands of the receiver, and it was held that a bill supplemental in its nature, filed in order to carry the prior decree into execution and administer the property, was to be regarded, not as an original suit, but as a continuation of the former suit, and that, as no other Court could execute that decree and make due administration of the property, the power of the Court to act was not impaired by the fact that persons who had acquired interests in the property or questions were citizens of the same State as the complainant in such last-named

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bill ; and the Court refer to cases in which a person acquiring rights as purchaser under a decree, is regarded as a party having a right to proceed in continuation of the suit, so far as to protect his rights, irrespective of any question touching his citizenship. In a recent case, (*Jones v. Andrews*, 10 *Wallace*, 327,) the Supreme Court have gone so far as to hold, that, where a judgment has been recovered in a suit in the Circuit Court, and the judgment creditor is proceeding in that Court, by the process of garnishment, against an alleged debtor of the defendant in the judgment, such debtor may file a bill supplemental or ancillary to his defence, to protect himself against a compulsory proceeding duly instituted to compel him to pay, showing by such bill a just and equitable defence, and the necessity of making the creditor not residing in the district a party will not defeat such ancillary suit. And, in *Freeman v. Howe*, (24 *How.*, 450,) where a suit had been duly commenced in the Federal Court by attachment of property, and, while the same was in the possession of the marshal, it was taken from him by process of replevin issued by the State Court at the suit of a third party, the Court not only held that such interference with the custody of the marshal was illegal, but declare that a bill of equity might, in such case, be filed by the plaintiff in the Federal Court against the plaintiff in the replevin suit, notwithstanding both were citizens of the same State. These cases proceed upon the ground, that, where the Federal Court is proceeding in the due exercise of its jurisdiction, it has power to regulate and control its own judgments, and carry them into execution, and power to maintain its own jurisdiction, and protect either plaintiff or defendant therein, in respect of the subject-matter thus lawfully within its jurisdiction, and, by an ancillary suit, to call in parties for those purposes, whether their citizenship would have authorized an original suit against them by the plaintiff in such ancillary proceeding, or not. The present is no such case. Here, the original suit was for the dissolution of a co-partnership, and the adjustment of the rights of the complainant and Dorr. In that the Marble Company had no interest,

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The C. H. Northam.

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and they have done nothing to prevent that suit from proceeding to its termination according to its intent and purpose. The cause of action against the Marble Company is its refusal to perform a contract made with the firm, and the decree sought is the specific performance of that contract. To grant the relief might be useful to the parties to the original bill, but it has no legal connection with the cause of action therein, and is in no sense necessary to the full exercise of the jurisdiction of the Court. It is not, in any sense, a continuation of the original suit, but an attempt to add a new cause of action against a new party.

This bill must be dismissed, as to the defendants the Sutherland Falls Marble Company, with costs.

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THE C. H. NORTHAM.

A tug, with five boats in tow behind her, in two tiers, three in the first tier, and two in the second tier, was passing up the narrow part of a harbor, when a side-wheel steamboat, going in the same direction, went by the tug and her tow. In doing so, her suction dragged back the boats in the second tier, so as to break some of their lines, and then the swell she created drove them against the sterns of the boats in the first tier, so that the middle boat in the first tier was damaged: *Held*,

- (1.) If the steamboat desired to pass at the speed she had maintained up to the time she created the swell, she ought to have passed at a greater distance;
- (2.) If the width of the channel was such that she could not pass at a greater distance, she should have reduced her speed in due season to prevent so heavy a swell.

(Before Woodruff, J., Eastern District of New York, February 9th, 1875.)

THIS was an appeal from a decree of the District Court, in Admiralty, in a case of collision. The opinion of the District Court, (BENEDICT, J.,) was as follows: "This action, which is said to be novel in the Admiralty Courts of this country, is brought by the owner of the canal-boat T. F.

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The C. H. Northam.

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Sheehy, to recover of the steamboat C. H. Northam damages caused to the canal-boat by the swell made by the C. H. Northam in passing.

"The weather, at the time, was fine, and there was no sea. The canal-boat was passing up the harbor to New Haven, in tow of the tug Gladwich. The tow consisted of five boats, arranged three in the first tier and two in the second. The T. F. Sheehy was the middle boat in the first tier. When the tow was passing the narrow part of the harbor, about opposite Fort Hall, the Northam, a large side-wheel steamboat, bound in the same general direction, passed the tow on the east side. As she passed, her suction first caught the tow and dragged back the canal-boats in the stern tier so forcibly as to break some of the lines, and then the following swell drove the boats ahead upon the sterns of the boats in the first tier. The suction and swell were unusual and beyond the power of ordinary tows to withstand. The libellant's boat was so injured by the blow delivered on her stern by the canal-boat which was behind her in the last tier, that it was necessary to remove her at once from the tow and beach her on the shore. For the damages thus caused this action is brought against the C. H. Northam.

"The following conclusions of fact are not open to question upon the evidence. The injury complained of was caused by the suction and swell made by the steamboat as she passed the tow. No negligence on the part of the canal-boat injured, or of the tug towing her, conduced to this injury. The character of the tow, its position and course were known to the steamboat as she approached from behind. No other vessels were near her, nor was there any circumstance connected with the navigation of that harbor which made it necessary for the steamboat to pass the tow where she did. It was within the power of the steamboat, not only, by waiting, to pass the tow at a less dangerous point, but, by slowing her speed, to pass where she did, without endangering the tow.

"These conclusions are sufficient for a determination of this

case, and they point irresistibly to a decree in favor of the libellant. For, the C. H. Northam is chargeable with a knowledge of the depth of the water, and of the amount of suction and swell she would create by passing in such water. She was the following boat, and, if she desired to pass the tow, it was incumbent upon her to do it at such a place and in such a manner as to cause no injury to the tow by her swell. Her right to pass the tow where she did was dependent upon her ability to pass without causing injury. If she could not pass in that place without causing injury by her swell, she was bound to wait until beyond the narrow place, and the attempt to pass where she did was negligence. If, on the other hand, by going slower than she did, she could pass where she did without causing a dangerous swell, then it was negligence to maintain the speed she did in passing. It seems clear, from the evidence, that the C. H. Northam could have passed the tow at this point in safety, and that without reducing her speed beyond what would be necessary to give her steerage way and carry her by the tow. This neglect to reduce her speed is, of itself, sufficient to render her liable for the damages which ensued.

“Let a decree be entered in favor of the libellant, with an order of reference.”

*Wilcox & Hobbs*, for the libellant.

*Owen, Nash & Gray*, for the claimants.

WOODRUFF, J. I am of opinion that the evidence in this case shows very clearly the want of proper care on the part of those controlling the navigation of the C. H. Northam, and that the tug and her tow were without fault. The steamboat was, of course, at liberty to pass the tow. If she would pass at the speed she had maintained to the time when she created the swell that caused the injury, she should have passed at a greater distance. If the width of the channel was such that she could not pass at a greater distance, she should have re-

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duced her speed in due season to prevent so heavy a swell. I think the proof fully sustains the views stated in the opinion of the District Judge.

Let a decree be entered for the libellant, with costs.

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JOHN M. DAVIES AND OTHERS *vs.* CHESTER A. ARTHUR.

D. entered imported merchandise as "silk ties." The collector exacted a duty of 60 *per cent. ad valorem* thereon, as "silk scarfs," under § 8 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 210.) D. protested against paying such duty, on the ground that the merchandise was "articles worn by men, women and children, and wearing apparel, and should only pay duty at 35 *per cent. ad valorem*," and was "neither scarfs nor ready-made clothing in fact, or as known in trade or commerce." The merchandise was in fact dutiable at 50 *per cent. ad valorem*, as a manufacture of silk, not otherwise provided for, under the concluding clause of said § 8. D. brought this suit to recover back the 10 *per cent.* excess of duty paid, as having been paid under protest: *Held*, that the protest was insufficient, because it did not set forth "distinctly and specifically" the grounds of the objection to the amount claimed, as required by § 14 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 215.) and failed to state the true ground of objection to the duty exacted.

(Before WALLACE, J., Southern District of New York, June 21st, 1875.)

WALLACE, J. Upon the importation by the plaintiffs, of merchandise entered by them as "silk ties," the defendant, as collector of the port of New York, exacted a duty of 60 *per centum ad valorem*, upon the assumption that the articles should be classified as "silk scarfs," under section 8 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 210). The plaintiffs protested against the payment of such duty, on the ground that the merchandise was "articles worn by men, women and children, and wearing apparel, and should only pay duty at 35 *per centum ad valorem*, under sections 22, Act of March 2, 1861, and 13, Act of July 14, 1862, and are neither scarfs nor ready-made clothing in fact, or as known



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in trade or commerce." It now appears, that the merchandise should have been classified as "a manufacture of silk, not otherwise provided for," under the concluding clause of section 8 of the Act of June 30th, 1864, and was dutiable at 50 *per centum ad valorem*. The plaintiffs now seek to recover the difference of 10 *per centum* between the proper duty and the duty exacted by the defendant; and the only question for consideration is, whether they are permitted to do so under their protest.

Unless the protest sets forth "distinctly and specifically" the grounds of the objection to the amount claimed, it fails to meet the requirements of the statute, (*Act of June 30th, 1864*; 13 *U. S. Stat. at Large*, 215, § 14,) and there can be no recovery. Although, in one sense, the articles imported may have been "silk ties," or "wearing apparel," or "articles worn by men," as claimed by the plaintiffs, or "silk scarfs," as claimed by the defendant, they were not such within the meaning of the laws imposing duties, but were "a manufacture of silk, not otherwise provided for," and the plaintiffs, therefore, failed to state the true ground of objection to the duty exacted. The office of the protest is to point out to the officers of the Government the precise errors of fact or of law which render the exaction of the duty unauthorized. (*Thomson v. Maxwell*, 2 *Blatchf. C. C. R.*, 385; *Curtis' Adm. v. Fiedler*, 2 *Black*, 461.) The plaintiffs can only be heard to allege, now, the objections distinctly and specifically stated in their protest. (*Norcross v. Greely*, 1 *Curtis' C. C. R.*, 114; *Swanston v. Morton, Id.*, 294; *Kriesler v. Morton, Id.*, 413; *Warren v. Peaslee*, 2 *Id.*, 231.) They are precluded, therefore, from insisting that their importation was a manufacture of silk, not otherwise provided for, and subject to a duty of 50 *per centum*, instead of 60, as exacted, when, by their protest, they allege it to be "wearing apparel," &c., subject to a duty of 35 *per centum*.

It is urged that the protest described the merchandise with sufficient accuracy to inform the collector of the character of the articles, by designating them as "silk ties," and

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was not vitiated by an error of law in classifying them as "wearing apparel," &c., subject to a duty of 35 *per centum*. The argument is, that the collector is presumed to have known the law, and could not have been misled by the error. If the error was one of law, it was this only that could have misled the collector. If he could not have been misled because theoretically he knew the law, there was no necessity for any protest; and the argument would prove too much, because it would lead to the conclusion that a protest is never necessary when the officers of the Government exact illegal duties upon an erroneous construction of the law. There is no reason for any distinction in the requirements of a protest, when predicated on errors of law on the part of the officers of the Government, and when upon errors of fact. The construction of the law is equally open to both parties, but the burden is imposed upon the importer to state the grounds of his objection, and to state them distinctly and specifically.

It is also insisted, on behalf of the plaintiffs, that, inasmuch as the collector claimed that the articles imported were "silk scarfs," and the protest stated that they were not "scarfs in fact, or as known in trade and commerce," it sufficiently stated the ground of the objection. This statement was merely a challenge of the collector's position, a denial that the articles were what he claimed them to be. Such a statement is not distinct and specific, for nothing can be more indefinite than a general denial. The collector can not fail to know that his position is challenged when the importer insists that the duty exacted is excessive; and, if a mere negation is the specific statement of objection contemplated by the statute, it would seem that the statute is a piece of very useless legislation.

The protest must be held insufficient, and judgment is ordered for the defendant.

*Edward Hartley*, for the plaintiffs.

*Thomas Simons*, (*Assistant District Attorney*), for the defendant.

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Schneider v. Barney.

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## CHARLES F. SCHMEIDER AND OTHERS

vs.

## HIRAM BARNEY.

Errors committed, on the trial of an action at law, against the party who obtains a verdict, are merged in the verdict.

Under § 5 of the Act of March 3d, 1857, (11 *U. S. Stat. at Large*, 195,) which provides that, on the entry of any goods, the decision of the collector "as to their liability to duty or exemption therefrom, shall be final and conclusive," unless the owner shall, within ten days, specify in writing the grounds of his dissatisfaction, and shall, within thirty days, appeal to the Secretary of the Treasury, and that the decision of the Secretary shall be final and conclusive, and the goods "shall be liable to duty, or exempted therefrom, accordingly," unless suit shall be brought within thirty days after his decision, such appeal is not a condition precedent to a right of action against a collector, to recover back duties illegally exacted by him, where the question is as to the rate or amount of duty, it being conceded that some duty is payable, but the statute applies only to a case where the question is whether the goods are liable to any duty or are wholly exempt from duty.

Whether, under said statute, a suit can be brought, where the Secretary of the Treasury unreasonably neglects to make and communicate a decision on an appeal, *quere*.

Under the Act of February 26th, 1845, (5 *U. S. Stat. at Large*, 727,) a collector who demands and receives illegal duties, which are paid to him under protest, is liable in an action of assumpsit for the amounts thus collected by him.

Under the Act of 1857, an appeal was taken to the Secretary of the Treasury from the decision of a collector as to the rate and amount of duties. On the trial of a suit against the collector to recover back the duties, the plaintiff gave evidence tending to show that he was justified in considering his appeal as having been decided against him, but the Court directed a verdict for the defendant: *Held*, that the question as to whether there was evidence of a decision by the Secretary upon the appeal, ought to have been submitted to the jury.

Where, in June, 1868, the same precise question had been decided by the Secretary, on appeal, against the plaintiff, and the Secretary had published a circular to that effect, and, in September and October, 1868, the plaintiff

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*Schmeider v. Barney.*

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presented the same question to the Secretary, on appeal, and, up to January, 1866, he had made no response, the plaintiff was justified in considering his appeal as having been decided against him.

An action against a collector of customs, to recover back money paid as duties, and alleged to have been illegally exacted, can be brought in the Circuit Court, although the parties are residents of the same State.

(Before HUNT, J., Southern District of New York, June 25th, 1875.)

HUNT, J. This action was tried in May, 1872, at a Circuit Court held in the city of New York, and resulted in the finding of a verdict for the defendant, by the direction of the Court. A motion for a new trial is now made by the plaintiffs upon the minutes of the Court. The brief of the counsel for the defendant takes a larger scope than is justified upon this motion. The only questions now to be considered are those specifically presented upon the trial for the decision of the Court, and which were ruled against the plaintiffs. The defendant having succeeded on the trial, is content with the result. He makes no motion, and the points presented by him on the trial, and ruled against him, are not now up for consideration. If any errors were committed against him, they are merged in the verdict in his favor.

The action was against Mr. Barney, as a former collector of the port of New York, and based upon the theory, that, as such collector, he did, in September and October, 1863, require and compel the payment by the plaintiffs of illegal duties upon certain goods imported by them in the steamers *America* and *New York*, in those months respectively. The action was to recover back the amount of duties thus paid. The plaintiffs proved the entry, invoice and protest of the shipments by the said steamers respectively; also, a certified copy of the appeal made to the Secretary of the Treasury from the decision of the collector. The details of these papers are not important to be stated. The objection of the plaintiffs to the demand of payment of duties, as made to the collector, and as embodied in their appeal to the Secretary, was, that they were "compelled to pay a duty at the rate of two cents per square yard, under section 9 of the tariff Act of July 14th,

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1862, in addition to a duty of 30 *per cent. ad valorem*." The *ad valorem* duty I understand to have been conceded by the plaintiffs to be a duty to which the goods were liable. The objection was to the additional two cents per square yard. After proving the payment of the duties to the collector, both *ad valorem* and by the square yard, the plaintiffs offered evidence of the description of goods embraced in the entry, to show that the duties had been illegally exacted. To this evidence the defendant objected, for the reason that it did not appear that the appeal by the plaintiffs to the Secretary of the Treasury had ever been decided. The evidence, and the only evidence, on this point was as follows, viz.: On the 16th of May, 1863, the plaintiffs addressed a letter to the Secretary of the Treasury, informing him that the collector of the port of New York had compelled them to pay two cents per square yard, under section 9 of the tariff Act of July 14th, 1862, in addition to a duty of 30 *per cent. ad valorem*, on certain goods, of the same character and class as those now in question, that they had notified the collector of their dissatisfaction, and that they now appealed to him, claiming that the merchandise was liable to a duty of 30 *per cent. ad valorem* only. To this letter the Secretary replied on the 3d of June, informing the plaintiffs that the decision of the collector was affirmed, for the reasons set forth in the decision of March 20th, 1863. The decision of March 20th, 1863, was in the form of a letter addressed by the Secretary of the Treasury to the collector of the port of Boston, in which his reasons were given for holding the goods to be liable to the duty of two cents per square yard. Prefixed to it is this statement: "Treasury Department, March 20th, 1863. The following decisions by the Secretary of the Treasury, of questions arising upon appeals by importers from the decisions of collectors, relating to the proper classification under the tariff Acts of March 2d, 1861, August 5th, 1861, and July 14th, 1862, of certain articles of foreign manufacture and production, entered at the ports of Boston, New York, &c., are published for the information of the officers of customs and others concerned. S. P. Chase,

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Secretary of the Treasury." Upon this evidence, and these offers, a verdict was directed for the defendant, to which the plaintiffs objected and excepted.

If an appeal to the Secretary and his decision were required by the law as it stood in 1863, as a condition precedent to a right of action, and if the evidence offered would not justify a finding by the jury that a decision had been made in this case, the direction of the Court was right. A concurrence on both points is necessary, to sustain the decision.

The plaintiffs insist, first, that the statute of March 3d, 1857, (11 *U. S. Stat. at Large*, 192,) in force at the time of this transaction, requiring an appeal and decision before suit can be brought, is not applicable to this case. The argument is, that the statute which makes the decision of the collector final, and permits a suit against him after an appeal to the Secretary and his decision thereon, applies to a decision upon a question whether the goods are liable to any duty, or are wholly exempt and free of duty, and not to a case where the question is as to the rate or amount of duty, it being conceded that some duty is payable. This construction is sustained by a careful examination of the language of the statute. The first section provides, that, on and after the first day of July then following, *ad valorem* duties, "in lieu of those now imposed," shall be imposed upon the articles enumerated in schedules A and B, to thirty *per cent.*, and upon those in schedules C, D, E, F, G, H and I, to certain other percentages, as specified. Section two distributes the various articles therein described into different schedules, thus subjecting them to different rates of duty. The marginal statement opposite section one is in these words: "Rates of duty on the different schedules;" that opposite section two: "Transfer of certain articles from one schedule to another;" that opposite section three: "Schedule of free goods." Section three enacts, "that, on and after the first day of July, 1857, the goods, wares and merchandise mentioned in Schedule I, made part hereof, shall be exempt from duty and entitled to free entry." Then follows Schedule I, embracing maps, charts,

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and numerous other articles, covering a page and a half of the statute book. Section four relates to goods in public stores on the first day of July, 1857, and then follows section five. It is there enacted, "that, on the entry of any goods, \* \* \* after July 1st, \* \* \* the decision of the collector, \* \* \* as to their liability to duty or exemption therefrom, shall be final and conclusive, \* \* \* unless the owner \* \* \* shall, within ten days," specify in writing the grounds of his dissatisfaction, and shall, within thirty days, appeal to the Secretary, whose decision, it is declared, shall be final and conclusive, "and the said goods \* \* \* shall be liable to duty, or exempted therefrom, accordingly, any Act of Congress to the contrary notwithstanding," unless suit shall be brought within thirty days after his decision. The Act distinctly states upon what question the decision of the Secretary shall be conclusive, to wit, whether the goods are "liable to duty or exempted therefrom." The point is, not whether they are to be included within one schedule or another, whether they shall pay thirty *per cent.* or fifteen *per cent.*, but whether they are liable to duty, that is to any duty, and, as if to emphasize and point the distinction, the statute adds, "or exempted therefrom," that is, from any duty. That this is the construction of the statute is apparent from the language, not only, but from the subsequent Acts of Congress. When Congress intends to embrace the case of rates and amounts within the same principle, it uses language admitting of no doubt. Thus, in the statute of June 30th, 1864, § 14, (13 *U. S. Stat. at Large*, 214,) it is enacted, that the decision of any collector "as to the rate and amount of duties to be paid \* \* \* shall be final and conclusive," unless the importer shall appeal to the Secretary, "whose decision on such appeal shall be final and conclusive, \* \* \* and such \* \* \* goods \* \* \* shall be liable to duty accordingly." The marked difference in the language of these statutes, the first providing that the collector's decision shall be final "as to their liability to duty or exemption therefrom," the other that his decision shall be final "as to the rate and amount of duties to be paid," the first

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providing, that, after the Secretary's decision is made, "the goods shall be liable to duty, or exempted therefrom, accordingly," the other, that, after such decision, "the goods shall be liable to duty accordingly," can only be explained upon the theory, that Congress intended, in 1864, to alter the law, by making the decisions of the collector and the Secretary applicable to decisions upon rates and amounts, as well as to questions of entire exemption. Section 2931 of the Revised Statutes re-enacts, in the same words, the provisions of the statute of 1864, above referred to, and that is now the law of the land. Being of the opinion that the objection under consideration was not well taken, for the reason that the provision does not apply to a case where the question was not as to an exemption from duties, but only as to the amount of duties, I do not think it worth while to examine the question whether a suit can be brought where the Secretary unreasonably neglects to make and communicate a decision, in a case where the provision is applicable. Both the Act of 1864 and the Revised Statutes provide, that the prohibition to sue ceases, where the decision of the Secretary is delayed for more than ninety days, in the case of an entry at a port east of the Rocky Mountains, or more than five months at a port west of those mountains. The question suggested is, therefore, of no practical importance, in the future.

By the common law, a collector demanding and receiving illegal duties, which are paid to him under protest, is liable in an action of assumpsit for the amounts thus collected by him. (*Elliot v. Swartwout*, 10 *Peters*, 137, 158; *Bend v. Hoyt*, 13 *Peters*, 267; *Maxwell v. Griswold*, 10 *How.*, 242.) In *Cary v. Curtis*, (3 *How.*, 236, 246, 249), it was held, recognizing the general rule, that this right of action was taken away by the Act of March 3d, 1839, (5 *U. S. Stat. at Large*, 348,) which required the collector immediately to pay over the money, Judges Story and McLean dissenting, and holding the collector to be liable notwithstanding the Act. The right is, by the Act of February 26th 1845, (5 *U. S. Stat. at Large*, 727,) restored, and placed as it was before the passage of the Act of 1839.



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I am of the opinion, also, that there was error in refusing to submit the question to the jury, whether there was evidence of a decision by the Secretary, upon the appeal to him. The payment of duties is absolutely necessary to the existence of the Government, and it is the duty of the Courts to enforce all the laws made for their collection. As the necessity is great, it is not unreasonable to say, that such laws must be rigidly enforced. This is the rule where duties are clearly payable, and where there is an evident attempt to evade their payment; where, however a fair question is presented, whether there is a liability, there is no reason for the laying on of a heavy hand. The case should be disposed of as if it were between individuals, and like any other question of liability or non-liability. In *Tacey v. Irwin*, (18 *Wallace*, 549,) the Supreme Court of the United States held to this effect. The statute provided, that lands sold for taxes might be redeemed upon a compliance with certain proceedings, of which payment of the amount of the tax to the Commissioners within a specified time, was the most important. The Commissioners, in the case before the Court, announced and published, that they would in no case receive payment, unless tendered by the owner of the land in person. A relative of the party went to the office of the Commissioners at the time appointed, to see about the payment of the tax, but, in fact, made no offer or tender of the amount. The Court held, that the previous announcement of the Commissioners was a waiver of the tender, or a refusal to accept the same, and that an actual tender of the money was unnecessary.

In the present case, the plaintiffs had already presented the precise question by appeal to the Secretary of the Treasury, to wit, on the 16th day of May, 1863. On the 3d of June following, the Secretary decided the appeal against them, and published a circular to that effect, and, as he stated in it, "for the information of the officers of customs and others concerned." When, in September and October, 1863, the plaintiffs presented the same question to the Secretary on appeal, and, up to January 1866, he had made no response, if

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the case of *Tacey v. Irwin* is good law, the plaintiffs were justified in considering their appeal as having been decided against them.

I have no doubt of the power of the Court to grant the amendment of the complaint allowed upon the trial, nor that an action against the collector of customs of the port of New York, to recover back money paid as duties under the revenue laws of the United States, and which it is alleged were illegally exacted, can be brought in the Circuit Court, although the parties are residents of the same State.

*Charles Tracy* and *Almon W. Griswold*, for the plaintiffs.

*Henry E. Tremain*, (*Assistant District Attorney*), for the defendant.

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IN THE MATTER OF THEODORE H. VETTERLEIN AND OTHERS,  
BANKRUPTS.

Before the commencement of proceedings in bankruptcy, the United States brought an action at law against the bankrupts, to recover the value of goods which had been forfeited for violation of the customs revenue laws. The defendants, after the bankruptcy proceedings were commenced, admitted the right of the United States to recover, and a judgment in favor of the United States was rendered. The United States proved, as a debt, against the bankrupts, the claim for the value of the goods, and sustained it by evidence derived from the books and papers of the bankrupts, seized under a warrant issued under § 2 of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 547:) *Held*,

- (1.) That the claim was provable as a debt under § 19 of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 525;)
- (2.) That the claim was not so merged in the judgment as not to be provable;
- (3.) That the evidence from the books and papers was competent.

(Before HUNT, J., Southern District of New York, June 25th, 1875.)

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In the Matter of Theodore H. Vetterlein.

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THIS was an appeal by an assignee in bankruptcy from the allowance by the District Court of a claim in favor of the United States.

*Francis N. Bangs*, for the appellant.

*Thomas Simons*, (*Assistant District Attorney*), for the United States.

HUNT, J. 1. I see no reason to doubt that the debt of the United States was provable under section 19 of the bankrupt Act, (14 *U. S. Stat. at Large*, 525.) The goods had become forfeited for violation of the customs revenue laws, and the statute gave the United States an action to recover their value. This right had been put in force by the commencement of an action to recover such value, before the proceedings in bankruptcy were commenced. The statute says, that "all debts due and payable from the bankrupt, at the time of the adjudication of bankruptcy, \* \* may be proved against the estate of the bankrupt." That an admitted right to recover from the bankrupts, in an action at law, the value of certain goods, which value is offered to be proved by witnesses, constitutes a debt against the bankrupts, is reasonably certain. Whether the debt arises from a promise to pay, or whether it arises from a duty or obligation to pay, is not important. (*In re Rosey*, 6 *Benedict*, 507; *Stockwell v. United States*, 13 *Wall.*, 531, where the point is expressly decided by the Supreme Court; *Bailey v. New York Central R. R. Co.*, 22 *Wall.*, 604; *Chaffee v. United States*, 18 *Wall.*, 516; *In re Denny*, 2 *Hill*, 220; 2 *Black. Comm.*, 153, 160, book 3, ch. 9.)

2. I do not discuss the question, whether the judgment recovered against the bankrupts was evidence of the indebtedness. If it was a valid judgment, it should be held to afford competent evidence of the debt. If it was not, it must be held, in these proceedings, as no judgment, and the parties must stand as if there were no judgment in existence. In the latter event, the claimant must establish his debt by proof

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upon the merits. This was done in the present case, by evidence obtained from the books and papers of the bankrupt, which were in possession of the collector by virtue of a warrant issued by the District Judge. It will not do for the assignee to say that the judgment is forbidden by law to be recovered, and that it is no judgment and affords no proof of the existence of the debt, and to say, also, that it is a good enough judgment to merge the original claim and prevent proof thereof by the owner. He cannot thus blow hot and cold with the same breath.

3. It is objected, that evidence taken from the bankrupts' books, which had been seized under the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 547,) was improperly admitted. Waiving the suggestion that this objection was not taken on the trial, and waiving the question whether this objection, if good, is available to an assignee, it is sufficient to say, that I have carefully examined this subject in the case of *United States v. Hughes*, (12 *Blatchf. C. C. R.*, 553,) and have reached the conclusion, that the objection is not tenable. The Act of 1868, which it is supposed will exclude this evidence, applies only to the evidence derived from a personal examination of a party or witness, not to evidence found in books or papers, and which may have been obtained under the statute referred to.

The order must be affirmed

## DION BOUCICAULT vs. JOSHUA HART. IN EQUITY.

In order to secure a copyright of a book or a dramatic composition, under the Revised Statutes, it is necessary not only to deposit with the librarian of Congress a printed copy of the title of the work, but the work must be published within a reasonable time after such deposit of the printed copy of the title, and two copies of the work must, within ten days from its publication, be delivered to the librarian.

Where a printed copy of the title of a dramatic composition was deposited in October, 1874, and a bill was filed in February, 1875, to restrain an infringement of the copyright of the work, but the bill did not allege any publication of the work, or any delivery of copies, or any reason why the same had not been done, it was held, on demurrer, that the bill did not show that a complete copyright had been obtained.

The exclusive right to publicly perform a dramatic composition, under section 4966 of the Revised Statutes, is dependent upon the existence of a copyright therefor.

Under section 4967 of the Revised Statutes, a person who had printed and published part of a dramatic composition, without the consent of its author, he being a citizen of the United States, and had publicly announced his intention to sell copies of the same, was restrained, by injunction, from printing or publishing the work.

Where the author of a dramatic composition has not printed it, but has only permitted and procured it to be represented on the stage of a public theatre for his own benefit, and through his selected channels, he has not abandoned it or dedicated it to the public, nor has he published it, within the meaning of the provisions of the Revised Statutes in regard to copyrights.

The right of an author of a dramatic composition, to retain and use it for his personal benefit, without publication, is a common law right.

This Court has no power to administer common law relief in a suit between citizens of the same State.

(Before HUNT, J., Southern District of New York, June 25th, 1875.)

HUNT, J. The facts, as alleged in the bill, are as follows: The complainant, Dion Boucicault, a citizen of the United States, and a resident of the State of New York, before October 26th, 1874, composed and wrote a dramatic composition called the "Shaughraun," of which he is sole proprietor. On the 26th of October, 1874, he mailed to the librarian of

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Congress a printed copy of the title of this play, and received from the said librarian the usual certificate setting forth the said filing of the title of said dramatic composition, "the right whereof he" (said Boucicault) "claims as author and proprietor, in conformity with the laws of the United States respecting copyrights." He complied in all respects with all the provisions of the Revised Statutes of the United States as to copyrights. On the 24th of November, 1874, Boucicault caused said play to be performed before persons licensed by him to witness the same, at Wallack's Theatre, for the especial benefit of said Boucicault, and such performances have continued there for his benefit and profit, and said drama has never been performed otherwise or elsewhere with his consent. Boucicault never printed said play for circulation or publication or sale, and the play is still in manuscript, and has never been published, circulated or sold, or copied, or used, in any way, with the permission of Boucicault, unless in the said performance of said play at Wallack's Theatre, for Boucicault's benefit. The defendant Hart is owner of a theatre on Broadway, called the Theatre Comique. He possessed himself, surreptitiously, without the consent of Boucicault, of the manuscript of the "Shaughraun," thus made himself acquainted with its contents, and printed and published the manuscript, or a material part thereof, under the name of the "Skibbeah," a play which professed to be "arranged" by one G. L. Stout. This play has twelve scenes, and eight of them are copied from Boucicault's play of the "Shaughraun." Defendant has printed and published said "Skibbeah," and publicly announced his intention to sell copies of the same, containing these eight scenes of Boucicault's play, without the license or consent of Boucicault. Defendant did also, on the 26th of January, 1875, and continuously since then, up to the granting of an injunction in this suit, publicly represent this "Skibbeah" at his Theatre Comique, on Broadway. Boucicault, at that time, remonstrated with the defendant, in writing, against his representing this play. The "Skibbeah," as far as these eight scenes are concerned, is merely a copy of

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Boucicault's "Shaughraun." It is, in plot, situation, stage business, language, costumes, scenery, incidents, and series and sequence of events, identical with Boucicault's play of the "Shaughraun." The four scenes which are not taken from the "Shaughraun" are taken from a play of which one Reeve is author, called "Pyke O'Callaghan," and these four scenes are merely introductory and accessory to the other eight scenes, which contain the material part of the said "Skibbeah," and are a mere copy of Boucicault's "Shaughraun." The bill prays for an injunction restraining the defendant from performing and representing the said play, or from printing or publishing any copy of the same, and for other relief.

To this bill the defendant demurs upon the following grounds, viz. : For that it appears, on the face of the bill, that the said drama called "Shaughraun" has been for a greater period than ten days prior to the commencement of this suit, publicly performed, and caused to be publicly performed, by the complainant, upon the stage of a theatre; and it does not appear by said amended bill that two printed copies of said drama, or any copies thereof, were filed in the office of the librarian of Congress, or sent by mail to said librarian of Congress, at Washington, District of Columbia, within ten days after the public performance thereof, or at any other time; and for that it is alleged, in said amended bill, that the complainant has never published, or caused to be published, the said drama called "Shaughraun;" and for that it does not appear, by said amended bill, that the complainant has ever given any notice that he has complied with the requirements of the Acts of Congress respecting copyrights; and for that it does not appear, by said amended bill, that the complainant has ever given any notice that the said drama is secured by copyright.

It is admitted, by these pleadings, that the plaintiff is the author of the literary work in question. It is also admitted, that the defendant, without the consent, and against the remonstrance, of the complainant, made use of said work for his own benefit, by performing the same at his theatre, and by

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printing and publishing copies thereof. The defendant insists, that, in so doing, he has violated no law of the land; in other words, that the complainant has not taken the measures necessary to secure to himself the exclusive right to the performance or the publication of the drama called the "Shanghraun." The complainant relies upon the deposit of a printed copy of the title with the librarian of Congress, as the act upon which the grant of copyright depends, and, having performed the act, insists that his copyright is complete. The defendant takes the position, that, no copies of the work being filed with the librarian, there is no right to sue; and that, to entitle an author to copyright, the author must deposit the book, as well as the title, with the librarian. This is the first question to be considered.

There is no common law of copyright which can affect this case. (*Wheaton v. Peters*, 8 *Peters*, 657.) The rights of the complainant to a copyright, if any he has, are conferred by the Constitution and the statutes of the United States. It is there that we must look for them, and, unless there found, they do not exist. If conditions are imposed by statute, as preliminary to the existence of such rights, their performance must be shown. All the conditions clearly imposed by Congress are important, and their performance is essential to a perfect title. (*Wheaton v. Peters*, *supra*.) The Constitution, in section eight, article one, gives to Congress power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." The first Act of Congress upon this subject was passed May 31st, 1790. (1 *U. S. Stat. at Large*, 124.) The first section of that Act secured to the author the sole right of printing, publishing, and vending his map, chart, or book, for the term of fourteen years "from the recording the title thereof in the clerk's office, as is hereinafter directed." The third section provided, that "no person shall be entitled to the benefit of this Act," where such book has been already published, "unless he shall first deposit, and, in all other cases, unless he shall before



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publication deposit, a printed copy of the title \* \* \* in the clerk's office," &c. "And such author \* \* \* shall, within two months, \* \* \* cause a copy of the said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks." The fourth section required, that, within six months after the publishing thereof, a copy of the book should be delivered to the Secretary of State, to be preserved in his office. The sixth section provided, that any person who shall print or publish any manuscript without the consent of the author, &c., shall be liable to damages. By a statute passed April 29th, 1802, (2 *U. S. Stat. at Large*, 171,) it was enacted, that, in addition to the above requisites, the author should give information by causing a copy of the required record to be inserted in the title page or the page of the book next to the title. This Act of 1802 was repealed, and the copyright Acts were amended, in 1831. (Act of February 3d, 1831, 4 *U. S. Stat. at Large*, 436.) Section 4 of that Act provided, that no person should be entitled to the benefit of the Act, unless he should, before publication, deposit a printed copy of the title of the book, &c., with the clerk of the District Court where the author resided. It also provided, that the author or proprietor of such book, &c., should, within three months from the publication of said book, &c., deliver a copy of the same to the clerk. The 5th section of that Act provided, that no person should be entitled to the benefit of the Act, unless he should give information of copyright being secured, by causing to be inserted, in each copy of each edition published, the words "Entered according to Act of Congress," &c. In July, 1870, Congress passed an Act to revise, consolidate and amend the statutes respecting patents and copyrights, (16 *U. S. Stat. at Large*, 198.) By section 90 of that Act, it was provided, "that no person shall be entitled to a copyright, unless he shall; before publication, deposit in the mail a printed copy of the title of the book, or other article, or a description of the painting, drawing, &c., for which he desires a copyright, addressed to the librarian of Congress, and, within ten days

from the publication thereof, deposit in the mail two copies of such copyright book or other article, \* \* \* to be addressed to said librarian of Congress, as hereinafter to be provided." The librarian is then directed to make a record of the name of such copyright book, in words specifically prescribed, and to give a copy of the same to the proprietor. By section 93, the proprietor of every copyright book is required to mail to the librarian of Congress, within ten days after its publication, two complete printed copies thereof, and a copy of every subsequent edition. Section 97 enacts, that no person shall maintain an action for the infringement of his copyright, unless he shall insert a notice thereof on the title page or the page immediately following. The various Acts mentioned have been referred to, to show to some extent the history and previous condition of the law on the subject under consideration. They are all superseded by the Revised Statutes of the United States, a work undertaken by authority of a statute passed June 27th, 1866, (14 *U. S. Stat. at Large*, 74,) and taking effect on the 1st day of December, 1873, (§ 5595.) Those statutes provide as follows: Section 4952 provides, that the author of any book, map, dramatic composition, &c., on complying with the provisions of the chapter, shall have the sole liberty of publishing and printing the same, and, in the case of a dramatic composition, of publicly representing the same. Section 4953 provides, that copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof in the manner thereafter directed. Section 4956 provides, that no person shall be entitled to a copyright, unless he shall, before publication, mail to the librarian of Congress a printed copy of the title of the book or other article, &c., for which he desires copyright, nor unless, within ten days from publication, he mails two copies of the copyright book or other article to the librarian. Section 4957 provides, that, immediately on receipt of the printed copy of the title of the copyright book or other article, the librarian is forthwith to record the same; and that he shall give a copy

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of the same when required. Section 4959 requires the delivery to the librarian of Congress of two copies of the book, within ten days after publication. Section 4960 provides, that the proprietor of a copyright book or other article, failing to mail printed copies of the book, &c., is to pay a penalty of twenty-five dollars. Section 4964, referring to books, provides, that, if any person, after the recording of the title of any book, shall, without the consent of the proprietor of the copyright first had in writing, print or publish any copy of said book, he shall forfeit the copy, and be liable to an action. Section 4965 makes a similar provision as to maps, charts, &c., and protects them from the time of the recording of the title. Section 4966 provides, that any person publicly performing any dramatic composition for which a copyright has been obtained, shall be liable to damages. Section 4967 provides, that any person who shall print or publish any manuscript without the consent of the author, who is a resident of the United States, shall be liable for all damages occasioned by such publication.

In applying these statutes to the question before us, viz., whether a copyright becomes a perfected right upon the filing of the title of the book or composition with the librarian, or whether a deposit of the book is also necessary to complete that right, two points are apparent. The first is, that the letter of the law does not, in any of the statutes cited, former or present, require the book to be filed, to confer a copyright. Under all of the statutes referred to, from that of 1790 to the Revised Statutes, the words of the law refer to filing the title page, and not to the deposit of the book. The second suggestion is, that it seems to be assumed throughout all of the statutes, that a copy of the book will, and must, within a short time after filing the title page, be filed with the librarian of Congress. Of this idea, section 4956 of the Revised Statutes affords an illustration. It had been enacted in the previous sections, that a copyright should be secured to authors, designers and composers; and, in this section, a definition is given, in a negative form, of the persons entitled

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to the benefit of the law. "No person shall be entitled to a copyright, unless he shall, before publication, deliver at the office of the librarian of Congress, or deposit in the mail, addressed to the librarian of Congress, \* \* \* a printed copy of the title of the book, &c., nor unless he shall, also, within ten days from the publication thereof, deliver, &c., or deposit, &c., addressed to the librarian, &c., two copies" of the book, &c. Any person shall be entitled to a copyright, who, before publication, first, shall deliver to the librarian a printed copy of the title of the book, and second, shall, within ten days after the publication thereof, deliver to the librarian two copies of the same. The book may not be printed or published when the title page is filed, and some right, (inchoate perhaps,) seems intended to be secured as of that date, although an actual printing or publication is not then made. But the expression "before publication" is based upon the idea that a printing or publishing will soon occur. This is put into clear meaning by the next clause of the section, that the author shall not be entitled to copyright, unless, "within ten days from the publication" he shall deliver two copies to the librarian. This means, that the author is required to publish his work, and, after he has so published it, and within ten days, he shall deliver two copies to the librarian. It is not a fair interpretation of this section to hold, that the filing of the title entitles to a copyright fully and absolutely, and that this may be defeated by a publication and failure to deliver two copies, but, as long as there is no publication, although it continue indefinitely, there is no lapse of the right. This construction is not permitted either by that idea which secures benefits to the author or inventor, upon the theory that the public is to be benefited, as well as himself, by his works, or by the principle pervading all this branch of the laws of patents, trade-marks, and copyrights, that an author or inventor must put his claim into the form of a well defined specification, work or composition, and so place it upon record that he cannot alter it to suit circumstances, and so that other authors and inventors may know precisely

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what it is that has been written or invented. The idea that an inventor may secure a patent for an invention of which he should not be required to file a specification, would not be tolerated. He may file preliminary or precautionary papers until his invention shall be completed, he may amend his specifications, and he may obtain reissues. It was never heard, however, that he could conceal the particulars of his invention, and, by filing a general statement of a discovery or improvement, cut off the rights and claims of others. The principle I conceive to be the same in regard to a copyright, and I hold, that, to secure a copyright of a book or a dramatic composition, the work must be published within a reasonable time after the filing of the title page, and two copies be delivered to the librarian. These two acts are, by the statute, made necessary to be performed, and we can no more take it upon ourselves to say that the latter is not an indispensable requisite to a copyright, than we can say it of the former.

In examining the rights of parties under the statutes of 1790 and of 1802, the Court held, in *Wheaton v. Peters*, (8 *Peters*, 664,) that, to secure a copyright, all the requisites of the statute must be complied with. "The acts required," say the Court, "to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and, within six months after the publication of the book, a copy must be deposited in the Department of State. A right undoubtedly accrues on the record being made with the clerk and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless. \* \* \* But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But, whether they are important or not, is not for the Court to determine, but the Legislature. \* \* \* They are acts

which the law requires to be done, and may this Court dispense with their performance? \* \* \* The notice could not be published until after the entry with the clerk, nor could the book be deposited with the Secretary of State until it was published. But these are acts which are not less important than those which are required to be done previously. They form a part of the title, and, until they are performed, the title is not perfect. The deposit of the book in the Department of State may be important to identify it at any future period, should the copyright be contested, or an unfounded claim of authorship be asserted."

The language of the Revised Statutes is stronger than that of the Act of 1870. By the latter Act, (16 *U. S. Stat. at Large*, 213,) it was provided, that no person should be entitled to a copyright unless he should file the title page with the librarian, "and, within ten days from the publication thereof, deposit in the mail two copies of such copyright book," &c. In the Revised Statutes, two negatives are distinctly specified, and, in either case, the defect is fatal. He must file his title page—if he fails in this, he fails in all—but he cannot then have his copyright, "unless he shall also" deliver two copies within ten days from publication. In addition to the first he must also perform the second requirement. (See the opinion of Sawyer, C. J., in *Parkinson v. Lasalle*, 21 *Int. Rev. Rec.*, p. 163; *Ever v. Cox*, 4 *Wash. C. C. R.*, 490; *Baker v. Taylor*, 2 *Blatchf. C. C. R.*, 82.)

In this case, the title page was filed on the 26th of October, 1874. The bill, verified in February, 1875, does not allege any publication of the work, or any delivery of copies, or any reason why the same has not been done.

The complainant also insists that this action can be sustained by virtue of section 4966 of the Revised Statutes. That section provides, that any person publicly performing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor, shall be liable in damages, as therein stated. If no copyright has been obtained by the complainant for this composition, there has

been no violation of a right secured by this section, and he takes nothing under this claim. By the Act of August 18th, 1856, (11 *U. S. Stat. at Large*, 138,) it was enacted, that the granting of a copyright to the author of a dramatic composition should be deemed to confer upon him the sole right to perform and represent the same on any stage, during the period for which the copyright was obtained. The same power is found in section 101 of the statutes of 1870, (16 *U. S. Stat. at Large*, 214.) Like the exclusive right to print, the exclusive right to perform, so far as these statutes are concerned, is dependent upon the existence of a copyright.

The bill alleges, also, that the defendant has, without the consent of the complainant, printed and published eight scenes of his play, and has publicly announced his intention to sell copies of the same. This proceeding is in violation of section 4967 of the Revised Statutes, which provides, that every person who shall print or publish any manuscript without the consent of the author, if such author is a citizen of the United States, or resident therein, shall be liable to the author for all damages occasioned by such injury. The demurrer admits this publication, and the defendant must be restrained from printing or publishing the play.

The defendant seeks to avoid the effect of this allegation, by the statement, that the bill does not aver that such publication took place after the recording of the title of the complainant's play. This averment is not expressly made, but it must be taken to be the fact, upon the pleadings. It is averred, that the complainant composed and wrote the play previously to November 14th, 1874; that, in October, he filed a copy of the title page, and the librarian recorded the same in the proper book kept for that purpose; that, on the 14th of November, he caused the same to be performed at Wallack's Theatre; that he has never printed the play for circulation; and that the defendant, by means unknown to him, has obtained a knowledge of the contents of the manuscript, and, without his consent, has printed the same. The fair meaning of this is, that this action of the defendant took

place after the title of the play had been deposited and recorded.

In dealing with this case, I have given no effect to the general allegation of the bill, that the "complainant has complied in all respects with the requirements of the Revised Statutes," that were necessary to enable him to copyright his composition. A demurrer admits allegations of fact only, not allegations or inferences of law. That the allegation in question is not one of fact is well illustrated by this case. Does the allegation include an averment that the complainant has deposited with the librarian printed copies of his work as well as of his title page? If such deposit is a requirement of the statute, it does include it. If it is not, it does not include it. We are thus directed at once to the solution of a question of law instead of a point of fact. Instead of averring that he has deposited a copy of his title page, and also two copies of the body of the book, the bill alleges that the complainant has deposited a copy of his title page, and that he has never published his work, and was, therefore, not required by the statute to deposit copies of the work. This is the legal effect of the averment.

I am also of the opinion, that there has never been a publication by the complainant of this work, within the meaning of the statute. The work has not been printed by the author, nor has it been abandoned or dedicated to the public. The author has permitted and procured its representation for his own benefit, and through his selected channels. This does not amount to a publication within the statute, or a dedication to the use of the public. (*Coleman v. Wathen*, 5 *T. R.*, 245; *Palmer v. De Witt*, 2 *Sweeny*, 547; *S. C.*, 47 *N. Y.*, 532; *Bartlette v. Crittenden*, 4 *McLean*, 300; *Roberts v. Myers*, 23 *Monthly Law Rep.*, 396; *Keene v. Kimball*, *Id.*, 660.) The English decision, (*Boucicault v. Delafield*, 9 *Law Times*, new series, 709,) cited to the contrary, is based upon the peculiar language of the English statute, and is not an authority in this case.

I am of the opinion, however, that the defendant has violated the complainant's common law right of ownership in



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his dramatic composition. The copyright law is intended to preserve to the complainant his exclusive right to multiply copies, to publish, and, in my judgment, only attaches perfectly where a publication is made. The ownership, however, and the right of an author to retain and use his dramatic works, for his personal benefit, without publication, is a common law right. It is recognized and defined by the statutes cited, but it exists independently of the statutes. In *Palmer v. De Witt*, (2 *Sweeny*, 547,) the Court says: "Whatever may have been the conflict of judicial opinion upon the effect of copyright laws upon the common law rights of authors, it has never been disputed, that, by the common law, an author has, until publication, a property in his literary work, capable of being held and transmitted, and in the exclusive possession and enjoyment of which he and his assignees will be protected." In the opinion of Monell, Justice, in that case, all the authorities are collected and presented. The same case is reported in 47 *N. Y.*, 532. It is there held, that the representation of a play on the stage is not such a publication or dedication to the public as authorizes others to print and publish it without the author's permission. The manuscript and the author's right are still within the protection of the law. The common law rights of authors to their literary productions, as they existed at common law, are now recognized. The author has the exclusive right to the first publication of his work, but no exclusive right to multiply copies or control the subsequent issues. This latter right is the creation of the statute of the United States. (*Boucicault v. Fox*, 5 *Blatchf. C. C. R.*, 97; *Boucicault v. Wood*, 7 *Am. Law Reg.*, 550.) Assuming this to be so, the difficulty arises, that this Court has no power to administer common law relief in a suit between citizens of the same State. The Courts of the State are the proper, and, usually, the exclusive tribunals for the performance of that duty. The United States have jurisdiction of common law questions when the controversy is between citizens of different States. When the controversy is between citizens of the same State, its jurisdiction is limited to ques-

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tions arising upon or under the laws or authority of the United States.

The result of my examination is, that the portions of the bill based upon alleged violations of the statute respecting copyright cannot be sustained; that the portions thereof based upon the alleged violation of section 4967 of the Revised Statutes are well laid, and the cause of action therein set forth is a good one; and that the common law right of the complainant to a protection in the performance of his play, constitutes a good cause of action, but, by reason of the parties being citizens of the same State, this Court has no jurisdiction to enforce the same.

The demurrer must, therefore, be overruled, and the defendant is allowed to answer within thirty days after service of a copy of the order overruling the demurrer.

*Richard O'Gorman*, for the plaintiff.

*Ambrose H. Purdy*, for the defendant.

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THE UNITED STATES, PLAINTIFFS IN ERROR

vs.

A LOT OF JEWELRY, LEON LABBE, CLAIMANT AND DEFENDANT  
IN ERROR.

S. delivered at New York, to the purser of a steamer about to sail from there to France, a package of jewelry, corded and sealed, and addressed to L. at Paris, France. An officer of the customs obtained the package from the hands of the purser, on board of the vessel, at New York, and made seizure of its contents as forfeited, for having been landed at New York, from a vessel which brought them from Havana, without a permit from the collector. Suit was brought against the diamonds, as forfeited. L. put in a claim to the goods, by S. as his agent, the claim being verified by S. At the trial, evidence was offered, on the part of the United States, of admissions made by

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S., after the seizure, to the effect that the goods had been left with him by L. their owner, for sale, that L. had brought them from Havana, and that S. had been unable to sell them, and was now returning them to their owner in France, but the evidence was excluded: *Held*, that the evidence was properly excluded.

While S. had the goods in his possession, such declarations respecting their ownership and his authority to dispose of them, were competent evidence.

Statements made by S. after he gave the goods to the purser, were narrative or historical.

Declarations by S., while in possession of the goods, in derogation of the title of L., were not competent evidence.

Under § 3082 of the Revised Statutes, possession of goods is not sufficient evidence to authorize conviction, until it is otherwise proved that the goods were imported contrary to law.

(Before HUNT, J., Southern District of New York, June, 25th, 1875.)

HUNT, J. This is a writ of error to the District Court for the Southern District of New York. The information alleges, that, on the 8th of August, 1874, the collector of the port of New York seized a package of diamonds addressed to Leon Labbe, and imported by the steamship City of Merida, as forfeited to the United States, for the reason that they were unladen from the ship within that District, without a permit from the collector. A monition was served upon Labbe as the claimant of the goods. Labbe intervened through Jules Sazerac, as his agent, who averred that Labbe was the true and lawful owner of the goods, and that Sazerac was the bailee thereof, as his agent. In his answer and plea Labbe denied that the goods had become forfeited as alleged in the information. The cause came to trial before the Court and a jury. To maintain his case, the District Attorney called as a witness James S. Chalker, a special agent of the Treasury Department, who testified, that, on the 8th of August, 1874, he saw Sazerac go into the purser's room of the steamer La Fayette, then lying in the port of New York, with a package, and soon come out without it; and that the witness, with others, then went into the purser's room and got the package from the purser, which he produced on the trial. It was a wooden box, corded and sealed, addressed "J. M. Leon Labbe, Paris,

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per steamer *La Fayette*." The witness seized the package, opened it, and found it to contain rings, brooches, lockets, &c., set with diamonds. Immediately afterwards, and on the dock, he saw Sazerac, who told him he had left the package with the purser. It was in evidence, that the *La Fayette* was not a recently arrived vessel, but had been some time in port, was preparing to sail for France, and on the same day did sail for France. The District Attorney then put this question to the witness Chalker: "What else did Sazerac at that time say to you, in regard to the goods in suit?" This question was objected to by the claimant, was excluded by the Court, and the District Attorney excepted to such ruling. The District Attorney further offered to prove, that, after Chalker had seized the goods, and before they had reached the seizing department of the custom house, Sazerac made admissions, to the effect that the goods had been left with him for sale by Labbe, their owner, that Labbe brought them from Havana on the *City of Merida*, in June, 1874, and that he, Sazerac, had been unable to sell the goods, and was now returning them to their owner in France. This offer was rejected, and the District Attorney excepted. Certain other evidence was then offered, which would have tended to prove that the goods in question had been smuggled, if the evidence before excluded had been given in the case, but which without that evidence was of no value. This evidence was excluded by the Court, and the District Attorney excepted.

Upon the principles of law applicable to that subject, the declarations of the agent Sazerac are not admissible to charge his principal or to affect his property. The evidence, aside from declarations or admissions, was simply this: Sazerac had the goods in his possession, and delivered them, boxed and corded, to the purser of the steamer *La Fayette*, then about to sail for France, directed to Leon Labbe, at Paris. While he had the goods in his possession, his declarations respecting their ownership, and his authority to dispose of them, were competent evidence. (*Bradley v. Spofford*, 23 *New Hamp.*, 444.) Even then, the declarations must be lim-

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ited to such matters as relate in some measure, and more or less directly, to the right of sale or the agency. . If I place my horse in the hands of an agent, with directions to sell him for a sum not less than \$100, his statement that he sells on my behalf, and that the price named was fixed by me, is competent evidence, and whatever inferences may be justly drawn from these facts must rest upon me. But, he would not be authorized by such agency and possession, to state that I had obtained the horse by a trespass or a theft of the property of A. B., and thereby destroy my title, and show A. B. to be the real owner of the property. Such matter has no connection with his agency. If he knows the fact of a trespass or a theft to exist, he must prove it as a witness, but he cannot, as an agent, interject it into the case, as an admission, to the injury of his principal. The general rule is, that the declarations of an agent, to be evidence, must constitute a part of the *res gestæ*. They must be made in the transaction of the business, and must constitute a part of it. Historical statements are not evidence. Narratives by an agent are not evidence. The declarations are evidence only upon the theory, that when and as an agent acts for his principal, he does and must speak for him. His acts would not ordinarily be intelligible if separated from his statements. But, when the business is done, and the transaction is actually closed, there is necessity neither for statements nor for acts. If the agent then chooses to talk about the matter, he talks for himself, and can properly charge no one but himself. This subject has been recently examined in the Supreme Court of the United States by Mr. Justice Strong, in the case of *Packet Co. v. Clough*, (20 Wall., 528,) where the authorities are cited, and the principles I have referred to are laid down.

In the case before us, the declarations of Sazerac were all made after he had parted with the control and possession of the goods. He had delivered them to the purser to be transported to Labbe, the owner. This ended all right or claim on his part. They had, also, been seized by the custom house authorities, and were in their possession. The duties and the

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powers of Sazerac as an agent were at an end. Any statements thereafter made by him were narrative or historical in their nature. This was necessarily so. His agency was to sell. That was ended, first, by his own act of delivery to the purser, and, second, by the action of the revenue officers in seizing the goods. If he spoke at all, it could only be of a past transaction.

Again, if the statements had been made while he was in possession of the goods, his declarations in derogation of the title of his principal were not competent, unless there is something in the position of the parties or the goods, as affected by the revenue laws, that alters the general law on this subject. The District Attorney argues that such is the fact, and that this peculiarity is to be found in the provisions of section 3082 of the Revised Statutes. It is there provided, that, "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined" or imprisoned, as specified. "Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury." To have a benefit from this statute, the District Attorney must establish two facts, which have not been proved in this case. First, he must show that the goods have been "imported contrary to law;" second, that the party proceeded against had knowledge of that fact. There was no evidence of either of these facts, nor any offer of proof of them, except by the admissions of the agent. Possession of such goods (it is declared by the statute) shall be deemed evidence sufficient to authorize conviction. "Such goods" are goods which shall be proved to be smuggled. When the smuggling is proved, the

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possession will authorize a conviction, but not until the smuggling is proved. The possession is not to be used to establish, nor does it tend to prove, the smuggling. This section is intended to apply to a case where a party is proceeded against, and a fine of \$5,000, or an imprisonment not exceeding two years, or both, is sought to be imposed upon him, for fraudulently importing merchandise, or receiving and concealing the same, knowing it to be so imported. The object and intent of the proceeding is the imposition of the fine and the imprisonment, not the recovery of the goods. The statement that goods so imported shall be forfeited, is incidental to the main point—the imposition of the fine and imprisonment. It is by virtue of sections 3059, 3061, 3072, and other sections, that goods are seized when imported in violation of law, and the authority of section 3082 is not needed for that purpose. It is for a violation of sections 2872 and 2874, requiring a permit to land and the payment of duties, that this action is brought, and to hold the goods as forfeited to the United States. The information further alleges, that the proceeding was in violation of section 3082, and that Labbe (not Sazerac) received, concealed and held the goods. There is, however, no suggestion in the pleadings, or on the trial, that a fine could be imposed, or that imprisonment could be inflicted, and Labbe is not before the Court except as a defendant in a civil suit, seeking to protect his goods. (*United States v. Sixty-seven Packages*, 17 How. 85; *Stockwell v. United States*, 13 Wall., 531.) In my opinion, the rules of evidence, as applicable to this suit, are not altered by the provisions of section 3082, but the case stands like other cases, and to be disposed of upon the general principles of law.

The District Attorney further insists, that the evidence was admissible, for the reason that Sazerac is the agent to claim these goods, and is proved to have been their custodian, and the only custodian they are shown to have had in this country; that it does not appear that there was any limit or scope to his agency; and that all his acts and sayings must go to the jury. The Court can hardly be asked to assume the

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agency to be more extensive than the counsel offered to prove it to be. The offer was as follows—to “prove admissions by Sazerac, that the goods had been left with him for sale by Leon Labbe, their owner, who lived in France; that Labbe brought the goods with him \* \* on the 17th of June, from Havana; \* \* that the day after he sailed for France; and that he (Sazerac) had been unable to sell the goods, and was now returning them to their owner in France.” If admitted, this evidence would have tended to prove: 1. That Labbe was the owner of the goods; 2. That he brought the diamonds from Havana; 3. That he left them with Sazerac to sell for him (Labbe); 4. That Sazerac was unable to sell, and attempted to return the goods to their owner. If admitted, this evidence would have proved an agency, limited to power to sell the diamonds, and with no other power.

I cannot see that the verification, by Sazerac, of Labbe's claim to the goods, by way of answer, can throw light upon the extent of his original agency, or authorize the admission of his previous declarations.

Upon the whole case, I am of the opinion that there was no error on the trial, and that the judgment must be affirmed.

*Henry E. Tremain, (Assistant District Attorney,)* for the plaintiffs in error.

*William Stanley and George S. Sedgwick,* for the defendant in error.



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In the Matter of Franklin A. Sloan, a Bankrupt.

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## IN THE MATTER OF FRANKLIN A. SLOAN, A BANKRUPT.

The provisions of the 29th section of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 581.) that, "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the Court for a discharge from his debts," require the application for a discharge to be made in all cases within one year from the adjudication of bankruptcy, whether there are debts proved or assets received, or not.

The District Court has no power, in any case, to grant a discharge, unless it be applied for within one year from the adjudication of bankruptcy.

(Before HUNT, J., Northern District of New York, June 29th, 1875.)

UPON the return day of an order to show cause why the bankrupt should not be discharged from his debts, certain of his creditors appeared, and, upon showing to the District Court that no assets had come to the hands of the assignee, objected, that, inasmuch as the application was not made within one year from the adjudication of bankruptcy, no discharge could be granted. The Court (WALLACE, J.) refused the discharge, and delivered the following opinion: "The grammatical construction of the 29th section of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 531), which controls the decision of the question now involved, has been the subject of conflicting decisions in several cases where it has been passed upon by the Courts. For the purposes of the present application, however, a construction must be adopted in conformity with that adjudged to be correct in cases which have been decided in both the District and the Circuit Courts for this District.

"It was held by my learned predecessor, that, in all cases, an application for a discharge must be made within the year from the adjudication. (*In re Wilmott*, 2 *Nat. Bkcy. Reg.*, 214.) A different conclusion was reached, however, by Judge

Nelson, in the Circuit Court, upon review of a decision of the District Court for the Southern District of New York; and it was held by him, that it is only in cases where the application can be made after sixty days from the adjudication that it must be made within a year. (*In re Greenfield*, 6 *Blatchf. C. C. R.*, 287; *In re Martin*, 2 *Nat. Bkcy. Reg.*, 548.) I confess I am unable to appreciate any reason that prompted a distinction to be made in the section, for the purpose of compelling one class of bankrupts to apply for a discharge within a year, while granting to another class an unlimited period. There is great propriety in requiring the privilege to be exercised within a reasonable time, because, a creditor who desires to oppose can only do so when the bankrupt chooses to move; and, if an unlimited time is permitted the bankrupt, he can wait until the absence of witnesses, the destruction of evidence, and the mutations of time have deprived the creditor of the means of efficient opposition. And it would seem that the reason for the limitation applies with equal force to all classes of bankrupts. These considerations go far to sanction the construction given by Judge Hall, but, for the purposes of this motion, it is unnecessary to adopt that construction. It is quite apparent, that a bankrupt whose estate has assets, and whose creditors have interposed to protect their rights, by proving their debts, should not be permitted to obtain his discharge until he has been subject to the orders and supervision of the Court sufficiently long to enable the assignee to avail himself of all the advantages which those orders afford for obtaining information and assistance from the bankrupt, and which, in many cases, are essential to the satisfactory administration of the estate. It was this view, probably, that influenced the framers of the law to provide, that, in such cases, no application shall be made for the discharge until the expiration of six months from the time of the adjudication of bankruptcy. The section under consideration provides, that such application may be made after sixty days, where either debts have not been proved, or assets have not come to the hands of the assignee. Inasmuch as assets did not accrue to

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the assignee in this proceeding, the bankrupt might have applied for his discharge at any time after sixty days from his adjudication and within one year. As held in *In re Woolums*, (1 *Nat. Bkcy. Reg.*, 496,) it is only when both debts have been proved and assets have come to the assignee, that the discharge cannot be applied for until after the expiration of six months. Within the construction adopted by the Circuit Court in *In re Greenfield*, as he could have applied prior to the expiration of six months, he was required to apply within one year from his adjudication. Not having applied within the year, he has not availed himself of the condition which, as I have heretofore held, is not permissive only, but imperative, if he desires to apply at all.

"The objections of the opposing creditors are, therefore, well taken, and the discharge must be denied. An order to that effect is, accordingly, directed."

The bankrupt applied to this Court for a review of the order.

*John H. Martindale*, for the bankrupt.

*Charles F. Durston*, for the creditors.

HUNT, J. I agree in all respects with the opinion of Judge Wallace in this case. The authority to apply for a discharge rests entirely upon section 29. It must necessarily be taken with the limitations in that section contained. The only right to apply, there given, is to be exercised within one year from the time of the adjudication. In my judgment, this applies to all cases, whether there are debts proved, or assets received, or not. It is a case of limited authority, and there is no power to grant a discharge unless it is applied for within the time prescribed. The excuse of the bankrupt for the delay is a reasonable one, and, if there was power, I should accept it as satisfactory.

If it be assumed that the distinction made by Judge Nelson, that the limitation of one year applies only to cases where

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there are no assets, or no debts are proved, is a sound one, the result here must be the same. No assets in this case have come to the hands of the assignee.

Holding the limitation to be imperative, and not subject to the discretion of the Court, there is no power to grant the discharge. In my view of the law, the District Judge was compelled to deny the application for a discharge, and his order to that effect is affirmed.

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IN THE MATTER OF JOHN M. JAYCOX AND JOHN A. GREEN,  
BANKRUPTS.

A corporation, created by the State of New York as a savings bank, and authorized to do the ordinary business of a savings bank, and also to receive on deposit, as bailee, articles of value, but having no authority to discount commercial paper, carried on habitually the business of discounting such paper. It discounted notes made by J., who afterwards was adjudged a bankrupt. The corporation was also adjudged a bankrupt. The assignee in bankruptcy of the corporation put in against the estate of J., in bankruptcy, a proof of debt for the amount of the money paid by the corporation to J. on discounting such notes: *Held*, that such proof of debt must be expunged.

Not only do the statutes of New York forbid the contract and make void the notes, but the money loaned or paid on the discount of the notes cannot be recovered back by the lender.

The corporation retained no title to the money loaned, and its assignee in bankruptcy acquired no title to it and no right to recover it back.

(Before HUNT, J., Northern District of New York, July 1st, 1875.)

HUNT, J. Upon an application to expunge the proof of debt made by the assignees of The People's Safe Deposit and Savings Institution of the State of New York, the Register reports that he has taken the evidence offered, and that the facts following are established by said evidence: (1.) That no claim is made by the assignees of said People's Safe Deposit and Savings Institution of the State of New York against the estate of Jaycox & Green, except the notes set out in sched-

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ule "A" annexed to the proof of debt, filed April 23d, 1873, amounting, of principal, to \$35,272.20. (2.) That the People's Safe Deposit and Savings Institution of the State of New York was a corporation organized under and by virtue of the provisions of chapter 816 of the Session Laws of the State of New York for 1868, the capital stock of which corporation was \$300,000, owned by divers individuals. (3.) That said corporation had a banking office in Utica and one in Syracuse. (4.) That, from April, 1871, until the bankruptcy of Jaycox & Green, in May, 1872, the corporation, in its office at Syracuse, discounted the paper of Jaycox & Green, to the amount of several hundred thousand dollars, and that, at the time of their bankruptcy, said corporation held their discounted paper, which paper is particularly described in the schedule annexed to the amended or supplemental proof of debt, filed September 15th, 1874. (5.) That, from April, 1871, until the bankruptcy of said corporation, it carried on a regular banking business, except that it did not issue circulation of its own, discounting, during that period, a large amount of paper, selling exchange, and doing, in fact, the ordinary business of a bank of discount and deposit, and doing a large business of that character for a city like Syracuse, so that, at the bankruptcy of said corporation, it had between \$600,000 and \$700,000 of discounted commercial paper standing out; and that, during the period referred to, the corporation kept a regular office for discounts and deposits in Syracuse, kept a large number of mercantile accounts, and made large discounts for merchants. (6.) That Jaycox & Green were wholesale grocers at the time the notes set out in the proofs of debt were discounted; that these notes were discounted at about their respective dates, and their proceeds were applied to the payment of other commercial paper of Jaycox & Green, which had been discounted for them; and that the line of accommodation paper discounted by said corporation for Jaycox & Green, for a year previous to their failure, amounted to \$35,000 and upwards. (7.) That there were fifteen trustees and directors of said corporation, and of these some resided in Syracuse or its

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vicinity, but they were not at the banking room very frequently. (8.) That the stock ledger of the corporation shows that, at the time of its bankruptcy, the trustees and directors held \$193,000 of its capital stock. (9.) That the corporation, besides discounting notes, made loans on bonds and mortgages and stocks, and received deposits, and issued pass-books therefor in the same form as those of savings banks; and that, at the time of its suspension, the entire deposits in the corporation at Utica and Syracuse, was between \$1,300,000 and \$1,400,000. (10.) That the capital stock paid in at the time of the suspension of said corporation was \$75,000, and the residue of the money used by the corporation in discounting paper consisted of deposits and accumulations, and such accumulations amounted to \$40,000. (11.) That the office of the corporation at Syracuse commenced discounting commercial paper and keeping commercial accounts soon after April 1st, 1871, and this was done by a resolution of the board of directors. (12.) That, at the time of the suspension of the corporation, pretty much all of the deposits in it at Utica were of the character of savings bank deposits, and upwards of \$1,000,000 of the deposits were of that character. The Register reported that said proof of debt should be expunged. The matter came on to be heard before Judge Wallace, the District Judge, and he having been of counsel in the matter, declined to hear it, and ordered that fact to be entered of record. It was, therefore, ordered that the proceedings be certified to, and transferred into this Court.

The findings of the Register are sustained by the proof, and present a clear and succinct statement of the facts of the case. Whether, upon these facts, a claim exists in favor of the Deposit Savings Bank, against the estate of Jaycox & Green, is the question to be decided.

For the purpose of brevity and convenience, the institution described in the petition in this case as "The People's Safe Deposit and Savings Institution of the State of New York," will be termed the Safe Deposit Company. This company was organized under and by virtue of the provisions of the

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Act of the Legislature of New York, passed May 14th, 1868, (*Chapter 816, of the Laws of 1868, p. 1839.*) By the first section of that Act the persons named were created a corporation, by the name and style above given, to be located outside of the cities of New York and Brooklyn, and, by the second section, the persons named were to constitute its board of directors for the first year. The provisions of the chapter are peculiar in many respects, but, for the purpose before us, it will only be necessary to notice the following: Section five provides that "the business and general object of the corporation shall be to take and receive on deposit, as bailee, for safe keeping and storage, coin, bullion, gold and silver plate, jewelry, bonds, &c., and to receive money from any estate or person on deposit and give a book, receipt, or certificate therefor, at any rate of interest not exceeding that by law allowed for deposits. By the eleventh section, the board was required to "invest its capital in good securities, \* \* in bonds and mortgages, public securities or stocks of any State or of the United States, or in the stocks or bonds of any city, county or town, corporation or association, or otherwise, of any State or the United States, in manner and form as the directors and officers might think proper." By section fourteen, it was declared to possess the powers, and be subject to the restrictions, contained in title third of chapter eighteen of the first part of the Revised Statutes, so far as applicable. That title enumerated the general powers of corporations, of suing and being sued, succession and the ordinary powers of incorporations. It contained also the following: "Section 3. In addition to the powers enumerated \* \* \* no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given. Section 4. No corporation, \* \* \* not expressly incorporated for banking purposes, shall, by any implication or construction, be deemed to possess the power of discounting bills \* \* \* receiving deposits \* \* \* buying and selling bills of exchange," &c. (1 *R. S.*, 600.)

The Constitution of the State of New York, of 1846, con-

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tained the following provision : "Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes, and in cases when, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws." (*Art. 8, § 1.*) Under this authority, the Legislature had passed a general banking law, providing that any persons might "establish offices of discount, deposit and circulation, upon the terms and conditions, and subject to the liabilities, prescribed in the Act." (*Act of April 18th, 1838, Laws of 1838, chap. 260.*) There was not at that time, nor until the year 1875, any general system for the incorporation of savings banks. In each case it was necessary to apply to the Legislature for an act of incorporation. What is familiarly called the restraining Act of the State of New York, contains the following provisions : "No person unauthorized by law shall subscribe to, or become a member of, or be in any way interested in, any association, institution or company, formed or to be formed for the purpose of receiving deposits, making discounts or issuing notes or other evidences of debt to be loaned or put in circulation as money ; nor shall any person unauthorized by law subscribe to, or become in any way interested in, any bank or fund created or to be created for the like purposes or either of them." (1 *R. S.*, 712, § 1.) "No incorporated company, without being authorized by law, shall employ any part of its effects \* \* \* for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt, to be loaned or put into circulation as money." (*Id.*, § 3.) "All notes and other securities for the payment of any money, or the delivery of any property, made or given to any such association, institution or company, that shall be formed for the purpose expressed in the first section of this title, or made or given to secure the payment of any money loaned or discounted by any incorporated company, or its officers, contrary to the provisions of the third section of this title, shall be void." (*Id.*, § 5.) By an Act passed February 4th, 1837, (*Laws of 1837, p. 14, § 1.*) the provisions of the above Act, so far as they prohibited per-



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sons not incorporated from keeping offices for the purpose of receiving deposits, or discounting notes or bills, was repealed. As to incorporated companies, the Act yet remains in force, as above set forth. With these references to the Constitution and laws, we are prepared to decide without difficulty some of the preliminary questions of the case.

1. The Safe Deposit Company was not a bank of discount and deposit, authorized to do the ordinary banking business of receiving current deposits, paying dealers' checks and discounting commercial paper. It was a savings bank, authorized to do the ordinary business of a savings bank, and authorized to receive on deposit, as bailee, and for safe keeping, the articles of value and securities mentioned in its charter. The Legislature did not intend and had no power under the Constitution, to organize by special charter a bank of discount and deposit. If those obtaining the charter had such an intention, it was a dishonest and a furtive one. There is no language in the charter that confers powers other than those conferred on ordinary savings banks, except in relation to its capacity to receive, as bailee, the valuable articles referred to.

2. The directors and managers of the bank intentionally and habitually violated the law in carrying on an ordinary banking business, including that of making discounts of notes. The proof shows, that, at the time of bankruptcy, it had more than \$600,000 of discounted commercial paper outstanding, and that this business was done by the express direction of its board of directors, and by the sanction of the stockholders.

3. The notes in controversy, amounting to \$35,272.20, were thus discounted by the Safe Deposit Company, in known violation of the laws of the State. Jaycox & Green, the borrowers, are in bankruptcy, and the Safe Deposit Company is in bankruptcy. The estate of the borrowers, ordinarily, should stand indebted for money actually received as a loan by its principals. This is the ordinary rule of law, and the enquiry is, whether other and counteracting principles must in this case prevail against it.

The objection to the right of recovery by the Safe Deposit

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Company while in existence, and by its assignees after its bankruptcy, is based upon the provisions of the Revised Statutes and of the restraining Act. By the third section of this latter Act, already quoted, every incorporated company not authorized by law is forbidden to make discounts of commercial paper. By the fifth section, it is enacted, that every note or other security made in contravention of the preceding section "shall be void." It is plain, from what has been said, (1st,) that the Safe Deposit Company is an incorporated company; (2d,) that it had not the authority of law to discount this paper, (*The People v. Utica Ins. Co.*, 15 *Johns.*, 358;) and (3d,) that, without such authority, it did discount it. The restraining statute first forbids the transaction, and, secondly, declares that the notes given for such a transaction shall be void. The contract itself is forbidden, and, therefore, illegal, and the security is also declared to be void. It is forbidden, both by section 4 of title 3, chapter 18, above cited, the company not being "expressly incorporated for banking purposes," within the meaning of that Act, and by section three of the restraining Act, also herein before referred to.

The illegal character of the contract, and its invalidity, as well as the invalidity of the security given upon it, is not an unusual condition of things under the laws of New York. The loaning of money at a greater rate of interest than seven *per cent. per annum* is forbidden by law. The contract of loan, when thus made, is illegal, and any security taken in in furtherance of it is void. (1 *R. S.*, 772, §§ 2, 5.) A contract to pay money arising out of a betting or gaming transaction is forbidden by law, and the contract itself, and any security connected with it, are equally void. (*Id.*, 662, § 8.) A contract for the sale or purchase of lottery tickets, or articles by raffle, is in like manner forbidden by law, and the contract itself and all securities arising out of it are void. (*Id.*, 665, §§ 22, 24, 26, 27, 34, &c.)

The argument to sustain the claim of a recovery on the part of the Safe Deposit Company, is based upon the idea that the loan of money by the bank is legal, that its charter author-

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ized the company to make loans, and that it was the form, time and manner of the loan which was objectionable; and that hence, while the security which embodies these objections is illegal and void, and cannot be recovered upon, the loan or the debt may and does remain valid. To support this view are cited what are called the Utica Insurance Cases. (*Utica Ins. Co. v. Scott*, 19 Johns., 1; *The Same v. Cadwell*, 3 Wend., 296; *The Same v. Bloodgood*, 4 Wend., 652; *The Same v. Kip*, 8 Cow., 20; *The Same v. Scott*, *Id.*, 709.)

The case in Johnson's Reports against Scott, arose upon a demurrer, and simply went to the point adjudged in the "*per Curiam*" opinion, that the security was void under the restraining Act, and judgment was ordered accordingly. The remark that, although the security was void, the money lent might be recovered, was entirely *obiter*.

In the case against Kip (8 Cow., 20,) the question was presented upon the second plea, which was for money lent, and the Court held, that, although the security was void, the loan constituted a valid cause of action, and gave judgment for the plaintiff. The only direct authority cited was the case against Scott, above referred to. The *obiter* remark of the Court in that case is quoted in full.

The case of Scott was carried to the Court of Errors (8 Cow., 709,) where the judgment below was reversed. It was there held, (1st,) that the insurance company had the right to loan their surplus funds, and to take a note as evidence of the debt, (p. 718;) (2d,) that the restraining Act did not apply to that company, by reason of the provision of their charter allowing them to invest their funds, (p. 719.) These were the conclusions of Spencer, J., in the only prevailing opinion reported.

In *Utica Ins. Co. v. Cadwell*, (3 Wend., 296,) the decision in Kip's case was adopted without comment or discussion. The Court, (Sutherland, J.,) say, that there is a distinction, as held by the former cases, between the security and the contract of lending; and that, as the lending was not declared to be void, wherever money was lent it might be recovered

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under the common counts, although no action could be sustained upon the security. The note was held to be competent evidence of money lent, under the common counts.

In relation to these cases I observe: 1. That they are distinguishable from the present in one important feature, viz., that the insurance company had the right to make personal loans of their surplus funds, and whether they made the loan upon the security of a bond or a note, or without either, it was declared, made no practical difference. This was the opinion of Spencer, Senator, in *Scott's Case*, (8 Cow., 709.) The company, in the present case, had no power to make personal loans. Its powers were restricted and limited to those contained in its charter. This is expressly declared in the provision of the Revised Statutes, already cited. Upon turning to the authority to make its loans, we find the subjects specifically set forth, as the stocks of the United States, or of the States, bonds and mortgages, bonds of cities or towns. Personal loans are not mentioned, and are, therefore, by statute, excluded from the class in which the moneys of this company can be invested.

2. The terms of the restraining Act now in force, as well as the language of the Revised Statutes, are quite different from the language of the Act in force when the Utica Insurance Cases were decided. "No incorporated company, without being authorized by law, shall employ any part of its effects \* \* \* for the purpose of making discounts." (1 R. S., 712, § 3.) Here is a positive prohibition against investing the funds of a corporation in discounted bills. Such a contract is illegal, as being positively forbidden by law. The language of the old Act was aimed at the creation of a company and the establishment of an office, like that of section one of the present Act, forbidding the becoming members of a company for the purpose of issuing notes, making discounts &c., and not containing the language above quoted. (2 R. L. of 1813, 234, § 2.) Neither does the old law contain the provision of title 18 of the Revised Statutes, that no corporation not expressly created for banking purposes, shall, by any

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implication or construction, be deemed to possess the power of discounting bills. Had the Revised Laws of 1813, which were in force when the Utica Insurance Cases were decided, contained these provisions, there is no reason to think they would have been decided as they were.

3. The correctness of the decisions in those cases, has been repeatedly questioned, and their authority much weakened. (See *New Hope Co. v. Poughkeepsie Silk Co.*, 25 Wend., 650, opinion of Mr. Justice Nelson; *Tracy v. Talmage*, 14 N. Y., 189, opinion of Mr. Justice Selden; and the opinion of Mr. Justice Comstock, in *Curtis v. Leavitt*, 15 N. Y., 98.) To give them the force contended for, will render the restraining Act substantially useless. If their holding is as broad as is contended for, they are in direct hostility to an almost endless line of authorities, to the effect that the violator of the law cannot recover upon a contract embracing or founded upon that violation.

4. The Utica Insurance Cases should not be confounded with that class of cases, of which *The Oneida Bank v. The Ontario Bank*, (21 N. Y., 490,) and *Curtis v. Leavitt*, (15 N. Y., 9,) are instances, in which the plaintiffs recovered for money advanced, although their security was repudiated. In the first of these cases, the statute of New York, (*Act of May 14th*, 1840, *Laws of 1840*, p. 306, § 4,) was involved, which declared that "no banking association shall issue or put in circulation any bill or note of such association, unless the same shall be made payable on demand and without interest." Mr. Augustus Perry loaned to the Ontario Bank \$14,000 and took its drafts on Duncan & Sherman of New York, for the amount, all being made and delivered about four weeks before their dates. The Court held, (1,) that these were drafts, within the statute mentioned; (2,) that they were not payable on demand; (3,) that they were illegal and void; and, (4,) that the lender or holder could recover from the bank issuing them the amount of money so loaned. The principle of this decision was this, that Perry had done nothing prohibited by law. He had simply loaned his money to the bank, and the bank

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had received it. The bank violated a positive provision of the statute in making its security for the loan payable on time, but Perry violated no law. All the cases recognize the distinction between the guilty party to an illegal contract and the innocent party. The bank violated a provision of the statute, in making its drafts payable on time, and was liable to its penalties, but Perry violated no law, statutory or moral, and was subject to no punishment. The cases of *Tracy v. Talmage*, (14 N. Y., 162,) *Curtis v. Leavitt*, (15 N. Y., 9,) and *Sackett's Harbor Bank v. Codd*, (18 N. Y., 240,) involve the same principle. In the case before us it is the guilty party, the violator of the law, the Safe Deposit Company, that seeks to enforce the illegal contract, against a party comparatively innocent.

It is further contended, admitting these loans to be illegal, that no title to the money received by Jaycox & Green passed to them, that the assignees represent stockholders and creditors, and that they have the right to recall the money, in an action for money had and received. The powers and authority of an assignee in bankruptcy are such as are given to him by the statutes of the United States. Every assignee appointed under the bankrupt Act possesses the same power, whether the scene of his action is in New York, Illinois or Texas. The statutes of a State cannot take away from him any of his lawful powers, nor, I apprehend, are his powers to be increased by the effect of State statutes. He is strictly and essentially a creation of the United States authority, intended to be subject to the United States jurisdiction, under a system of bankruptcy which shall be uniform throughout the whole country. It is to the statutes of the United States, therefore, and not to the statutes of the State of New York, giving power to local and State trustees, executors or assignees, that we are to look for the solution of the question now under consideration. (*Curtis v. Leavitt*, 15 N. Y., 44.)

The powers and the authority of an assignee in bankruptcy are particularly specified in the fourteenth section of the bankrupt Act. (14 U. S. Stat. at Large, 522.) The Register is, in that section, directed to make a conveyance to the as-

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signee of "all the estate, real and personal, of the bankrupt," and, thereupon, "the title to all such property and estate, both real and personal, shall vest in said assignee." It is further declared, "that all the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, \* \* \* all debts due him or any person for his use, \* \* \* all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract or from the unlawful taking or detention of, or injury to, the property of the bankrupt \* \* \* shall \* \* \* be at once vested in such assignee." It is further declared, that the assignee "may sue for and recover the said estate, debts and effects, and may prosecute and defend all suits at law or in equity pending at the time of the adjudication in bankruptcy, in the same manner and with the like effect" as the bankrupt could have done. There are numerous provisions scattered through the Act to carry out these powers, but the powers enumerated above, it is believed, embrace every authority that can bear upon the point under consideration. In substance, the statute gives authority to the assignee, (1st,) to seize, sue for and recover any and all property, estate or rights belonging to the assignee at the time of the commencement of the proceedings in bankruptcy; and, (2d), to sue for and recover any property conveyed by the bankrupt in fraud of his creditors. If the property belonged to the bankrupt at the time specified, or he then had an interest in it, legal or equitable, whatever might be its form, a right at once vested in the assignee. If the bankrupt had no such right or interest, but would have had, except that he had previously made a conveyance of his property for the purpose of defrauding his creditors, the assignee was authorized to attack such fraudulent conveyance and recover the property which had passed under it. As against the bankrupt, that conveyance was good, but, as representing his creditors, who, under certain circumstances, could attack it, the assignee was authorized to take measures to set it aside.

The claim against Jaycox & Green does not fall within

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either branch of this authority. The money loaned by the Safe Deposit Company to Jaycox & Green became the property of the latter, was taken by them into their possession, and became mixed with, and a part of, their general funds. It was, for this purpose, the case of an ordinary loan of money, by which the lender parts absolutely with his money and all right and interest in it, and receives in return the note or other security of the borrower. The lender has no rights in law or equity to the money loaned, or any lien or claim upon the same. The present loan, although forbidden to be made by the Safe Deposit Company, and illegal on their part, was nevertheless, made in fact. It was an accomplished fact, and the money and all interest in it passed beyond the control of the company, more completely, if possible, than in the ordinary case of money loaned.

Nor can the transaction come under the head of a conveyance by the bankrupt of his property "in fraud of his creditors." That is a case of one who, for his own benefit or that of his family, conveys property in which he secretly reserves an interest for his own benefit, or by which he intends dishonestly to prefer one class of creditors to another. Here, the Safe Deposit Company intended no reserved benefit to itself. Jaycox & Green were parties to no such intention. Nor was it intended to prefer one creditor or class to another.

The Safe Deposit Company, in violation of law, entered upon a general banking business. As a part of that business, it loaned the money in question. It was an illegal contract. It was made, however, by the corporation, under a formal resolution of its board of directors, and sanctioned by the acquiescence of its stockholders at its annual meetings. It has been already shown that the company could not recover either upon the security received or for money loaned. If it is possible for a corporation itself to make a contract so that the question of an excess of power on the part of its agents cannot arise, this is such a case.

The point under consideration is not well taken, and, upon the whole case, I am of the opinion that the claim of the as-

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signees against the estate of Jaycox & Green cannot be sustained, and that the proof of the debt of the Safe Deposit Company must be expunged.

*George Doheny*, for the assignees in bankruptcy.

*William M. Brown*, for the creditor.

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HENRY O. LAKIN, ASSIGNEE IN BANKRUPTCY OF HARRINGTON,  
WILCOX & Co.

*vs.*

THE FIRST NATIONAL BANK OF JAMESTOWN. IN EQUITY.

In a suit in equity, brought by an assignee in bankruptcy, to recover certain notes alleged to have been transferred in violation of the bankruptcy Act, the bill alleged the filing of a voluntary petition by the bankrupt, the appointment of the assignee, and the assignment to him. These allegations were admitted by the answer: *Held*, that it was not necessary the bill should allege directly that there had been an adjudication of bankruptcy.

Circumstances discussed, on the question as to whether the officers of a bank had reasonable cause to believe that the bankrupt was insolvent, or that the transaction between the bank and the bankrupt was in fraud of the bankruptcy Act.

What would be evidence of insolvency or of fraud in a strictly commercial community, may have less significance in a rural district.

Bill dismissed, without costs.

(Before HUNT, J., Northern District of New York, July, 1st, 1875.)

THIS suit was brought to recover certain notes in the hands of the defendants, claimed to have been taken and to be held in violation of the provisions of the bankruptcy Act. It was heard on pleadings and proofs.

*A. P. Laning*, for the plaintiff.

*George Gorham*, for the defendants.

HUNT, J. The defendants object to the right of recovery in this case, on the ground that the complainant has not averred or proved that Harrington, Wilcox & Co. were ever adjudged to be bankrupts, contending that he cannot bring the action, as their assignee, before such adjudication. The bill alleges, that, on the 28th day of August, 1867, this firm of traders presented their petition to the District Court, praying that they might be adjudged bankrupts within the provisions of the Act on that subject, and be discharged from their debts; that such proceedings were had, that the complainant was duly appointed the assignee of all the estate of said firm, under the provisions of the said Act; and that, on the 15th day of January, 1868, Charles P. Vedder, a duly appointed register in bankruptcy, to whom the matter was referred by the Court, did convey to the complainant all the estate of the bankrupts, referring to such instrument of assignment. All these allegations are admitted in terms in the answer, and it is admitted "that the complainant was duly appointed assignee in such matter, pursuant to the Act of Congress," and that Vedder, the register, made the assignment as is set forth in the bill. These allegations and admissions seem to be quite sufficient for the purpose mentioned. Passing by the question of the effect to be given to the word "duly," it is admitted in the pleadings that the petition was presented, that it was referred to the proper register, that by such register the complainant was appointed assignee, and that a conveyance was made to him accordingly.

The statute declares, (§ 11,) that, when proceedings of this nature are taken, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt. The further proceedings depend upon the fact of opposition or no opposition. If the latter, the register shall direct notices to be published, and procure a meeting of creditors, who shall

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choose an assignee; or the register, upon their failure to make such choice, shall appoint an assignee. If there be opposing interests, the appointment shall be made by the Judge. To this assignee a conveyance is directed to be made by the register, if there is no opposition—by the Judge, if there is—which passes to him all the bankrupt's estate.

I see nothing in this statute which requires the adjudication of bankruptcy to be set out in the bill. In the first place, the adjudication is a legal result, occurring of itself, and necessarily, upon the facts stated. The presentation of a petition, the appointment of an assignee, and the conveyance to him by the register, necessarily assume that there has been an adjudication. Without it, there could be no such proceedings.

Again, there is no principle of good pleading which requires an assignee or trustee to state in his bill the details of the facts by which he becomes entitled to maintain a suit. He alleges, that, upon the facts averred, a cause of action under the statute of bankruptcy has accrued to the assignee of Harrington, Wilcox & Co., that he is such assignee, appointed by the proper officer, the register, and that he has received a conveyance from him, and he prays judgment. This is good pleading. The rest is matter of evidence.

Again, when it is expressly admitted that the complainant is the assignee under the bankrupt Act, that is all there is to be said about it.

I do not think it necessary, therefore, to decide whether the order adjudicating bankruptcy, produced upon the argument, can be considered.

The insolvency of Harrington, Wilcox & Co., at the time of the transfer of the notes, is fully proved, and is not disputed; but it is said that there is not sufficient evidence that the defendants knew, or had reasonable cause to believe, that this evidence existed, or that they knew that the transfer was made in fraud of the Act. The firm of Harrington, Wilcox & Co., began its operations on the 27th of June, 1866. It closed by the sale to Carpenter, on the 13th of June, 1867.

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It sold to Carpenter, in bulk, at a discount of twenty-five *per cent.* on New York prices, payable in monthly instalments of \$400 each, without interest, taking thirty-three notes of \$400 each, for the amount, extending over thirty-three months. The loss of interest, by this credit, made an additional discount of eight or ten *per cent.* on the sale. The proceeds of this sale, \$13,200 in form, and about \$1,000 in good accounts, constituted the assets of the firm. Its indebtedness amounted to \$24,000, of which one-half was payable to merchants in New York, the other half to Andrews & Preston and the First and Second National Banks of Jamestown. This insolvency Wilcox testifies that he was aware of, when he delivered the thirteen notes to Kent, the President of the First National Bank. It is testified to, by Mr. Abbott, and is pretty much admitted by the evidence of the bank officers, that a note of Harrington, Wilcox & Co., of \$500, to Abbott's firm, due in May or June, was sent to the bank for collection, was unpaid at maturity, and had so remained for about thirty days, at the time the notes were received. It appears, also, that Harrington, Wilcox & Co. owed the bank about \$5,000, for which they had no security, except the notes of the firm at various dates, and running from sixty to ninety days; and that they agreed with the firm, that, if they sold out to Carpenter, they would take the notes to be received from him, in exchange for the notes of the firm then held. It is quite extraordinary, that a bank, for no other reason than that the party should continue to do business with it, (which is the reason given by the cashier), should give up good notes at short dates, and receive for them notes payable at one and two years and intermediate times. The less of that business a bank should do, the better it would be, one would suppose, and some other reason must be sought for such an exchange. It is an unusual circumstance also, that these notes should have been taken by the president at the store of Harrington, Wilcox & Co.; and not at the bank, and that he should have been advised by the cashier to go to the store to get them. In well conducted institutions, the business of the bank is done at the banking

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house. Presidents and cashiers do not run around the city or village to get the notes of their dealers, and receive them at the stores of their solvent debtors. If debtors are embarrassed, and the security is doubtful, the officers or their attorneys do make such visits, but we should not look for it in the case of customers of a bank, whose credit was undoubted. These are suspicious circumstances, and tend strongly to fix upon the bank a knowledge of the insolvency of Harrington, Wilcox & Co., when they took the notes in suit.

On the other hand, it is to be considered, that, in a small place like Jamestown, commercial punctuality is not as highly prized as in the larger cities. It is testified in this case, and it is true generally, that, in such places, men who are perfectly able to pay their notes, do allow them to go to protest, and to lie under protest till it is convenient to pay them. Country debtors act upon the theory that any inconvenience arising from the non-payment of a note at its maturity had better be borne by the creditor than by the debtor. What would be evidence of insolvency or of fraud in a strictly commercial community may have less significance in a rural district. The president, Mr. Kent, and the cashier, Mr. Mayhew, both certify, not only that the credit of this firm was not affected by the non-payment of their notes in May, 1867, but that they had entire confidence in their solvency when they took these notes, and that they took them without suspicion. The senior Wilcox had, within the year, desired Mr. Kent to receive the name of the firm for whatever was wanted by them, and stated that he was worth \$25,000, clear of all incumbrances, consisting of real estate, bonds and mortgages, and Government bonds. This statement Mr. Kent says that he relied upon. Mr. Wilcox, one of the partners, testifies, that, until he took an inventory, to complete the sale to Carpenter, he supposed the firm to be solvent, and that he was greatly surprised at the result of the inventory. This was a few days before the notes were delivered to the bank. On the 19th of May, the bank renewed a note of the firm for \$1,000, endorsed by Andrews & Preston, who were good, by

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taking in its place the note of the firm, endorsed only by S. S. Wilcox, one of the firm. That the reputation of the firm was very good, and that their failure created much surprise, appears, also, by the evidence of the witnesses called by the complainant.

Although the matter is not free from doubt, I am not able to find that the defendants had good reason to believe the firm to be insolvent when they received the notes, or that they knew that they were transferred in fraud of the provisions of the bankrupt Act. The bill is dismissed, but without costs to either party.

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GEORGE H. WOOSTER

vs.

GUSTAVUS SIDENBERG AND OTHERS. IN EQUITY.

W., during the first term of a patent for a folding guide for sewing machines, and while he was the sole owner of such patent, and was also interested in the sale of certain sewing machines, publicly authorized all purchasers of such sewing machines to use such folding guides without compensation. S. owned and used, during such first term, 125 of such sewing machines, and owned and was using, when such first term expired, 56 of such folding guides. The patent was extended : *Held*, that S. had a right to continue to use, during the extended term, such identical 56 folding guides.

(Before SHIPMAN, J., Southern District of New York, August 3d, 1875.)

SHIPMAN, J. This is a bill in equity, praying for an injunction and an account, and is founded upon letters patent for a folding guide for sewing machines. The patent was issued to Alexander Douglas, on October 5th, 1858, and was extended for seven years from October 5th, 1872. In August, 1863, said Douglas conveyed an undivided half

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part of said patent to Samuel S. Sherwood. Douglas and Sherwood conveyed the patent to Nathaniel Wheeler and William Whiley, partners by the name of Wheeler & Co., on May 5th, 1864, and said Whiley conveyed his interest therein to said Wheeler on May 29th, 1868. The assignments to Sherwood and to Wheeler & Co. were respectively for the unexpired portion of the original term of the patent. In September, 1872, Mr. Douglas, the patentee, assigned all his interest in the invention and letters patent to the complainant, to whom, as assignee, the patent was reissued on December 10th, 1872.

The answer of the defendants admits the grant, extension and reissue of the patent, denies the novelty of the alleged invention, and further alleges, that, at the time the bill was filed, the defendants "had in use fifty binders, substantially such as are described in the reissue, and no more, all of which binders they had in lawful use at the expiration of the original term of said patent, which lawful use they acquired in three independent ways"—*first*, by a license, in 1863, from Douglas and Sherwood to Gustavus Sidenberg; *second*, by a free license from Nathaniel Wheeler to all users of Wheeler and Wilson sewing machines; *third*, by a dedication of the patent to the public, by Douglas, the patentee. Upon the trial, the validity of the patent was admitted, and the defendants solely relied upon the right which they had obtained by the two licenses, to continue the use of those binders which were in use at the expiration of the original term of the patent.

The defendants commenced business as manufacturers of ladies' linen collars and similar articles, about January 1st, 1863. On October 5th, 1863, Gustavus Sidenberg obtained a license from Douglas and Sherwood to use the folding guide for which Douglas had obtained a patent. By the provisions of this license, the licensee agreed to pay, in addition to his original payment of fifty dollars, the sum of five dollars for each guide which he should use, and, if he used, at any time, any guide without having first paid said five

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dollars, as an additional compensation for the right to use the same, the license should be null and void, and the licensee should also be deemed guilty of infringing said patent. Gustavus Sidenberg paid Douglas and Sherwood fifty-five dollars, on or about October 5th, 1863. Nothing more was paid to them, or their assignees, by either of the defendants. On October 5th, 1872, the defendants were using in their factory fifty-six Douglas guides, of which number forty-six had been made by William Priess, an employee of the Wheeler and Wilson Manufacturing Company, and ten had been made by William Brockmann, an employee of the defendants. The guides which Brockmann made were destroyed in a few days after the date of the reissue. Prior to 1864, Nathaniel Wheeler was president of the Wheeler and Wilson Manufacturing Company, a corporation for the manufacture of sewing machines, and, in May, 1864, the firm of Wheeler & Co., of which he was a member, became the owner of the Douglas patent. During his ownership of this patent, he authorized all persons who used the Wheeler and Wilson machine to use the Douglas guide, whenever they had occasion to do so, without compensation. The patent was apparently held by Wheeler & Co. for the benefit of the Wheeler and Wilson Company, and to promote its interests, and, with that object in view, Mr. Wheeler gave a parol and general authority to all users of the Wheeler and Wilson machines to procure, use and continue to use the Douglas attachment, if they chose so to do. The complainant urged, upon the trial, that this permission of Mr. Wheeler was limited to a permission to the owners of Wheeler and Wilson machines, to obtain, without royalty, the Douglas guide from some one of the employees of the company. It is true, that, upon cross-examination, in reply to the following question, "You say, in your direct examination, that you authorized those using the Wheeler and Wilson machine to use said patent, whenever they had occasion to do so, without compensation. Can you name any person to whom you gave such permission? If so, name all you can remember"—Mr Wheeler said, "I gave permission to the employ-



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ees of our company to make the binders, on their own account, for such customers using our machines as might require them. I cannot call to mind the names of any such customers at this time." I do not understand from this portion of Mr. Wheeler's testimony, that he intended to say that he confined the use of the patent to those customers only who should procure the guides from the employees of the Wheeler and Wilson Company. He had previously said that all those who used the machines had authority to use the guides, and, upon being requested to give the names of all persons to whom he had given such permission, replied that he could not recall the names of the customers, but he did remember that he specifically permitted the employees of the company to make binders for all such customers as might require them. The witness did not intend to restrict the comprehensive character of the language which he had previously used. The defendants owned and were using in their business, prior to October 5th, 1872, about one hundred and twenty-five Wheeler and Wilson sewing machines.

The material question, which arises upon the foregoing facts, is—Have the defendants a right, by virtue of the authority conferred by Mr. Wheeler, to continue the use of the guides which were in use at the expiration of the original term of the patent?

The license of Douglas and Sherwood affords the defendants no protection. By the terms of that license, they had a right to use only such guides as had been previously paid for, and, in respect to the use of all other guides, had declared themselves to be infringers. They had paid Douglas and Sherwood for one binder only, and were in the lawful use under those licensors, of no binder except the one for which they had paid. The right to use additional binders never existed. (*Steam Cutter Co. v. Sheldon*, 10 *Blatchf. C. C. R.*, 1.)

But, the right of the defendant which was obtained through Mr. Wheeler is of a different character. He had

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publicly authorized all purchasers of the sewing machines in the sale of which he was interested, to use these guides without compensation. The consideration which moved him to give this permission was one with which he was satisfied. Prior to the date of the expiration of the original term, he would not have been allowed to prevent the defendants from the use of the binders which they had theretofore purchased. Probably all the guides which they then had in their possession were made after the assignment to Wheeler & Co., and, if a few were in existence prior to that date, the use of these few, which was originally unlawful, had become lawful by the license of Mr. Wheeler, the assignee.

But, it is said, that, admitting that Mr. Wheeler could not have stopped the use of these fifty-six binders, it does not follow that the defendants have the right to their continuing use after the expiration of the original term of the patent, for the following reasons: The statute (*section 4928 of the Revised Statutes of the United States*) provides, that "the benefit of the extension of a patent shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their interest therein," and the right granted by Mr. Wheeler was a mere license, and neither an assignment nor a grant, within the meaning of this section, nor a sale of the binders, and a party seeking the protection of the Act must be a purchaser of the patented article, or be protected by some agreement of sale which the owner of the original patent had a right to make, who, in this case, had not a right to license the use of the binder during the extended term.

The Supreme Court had occasion, in *Mitchell v. Hawley*, (16 Wall., 544,) to consider this clause of the patent Act, and to point out the "distinction between the grant of the right to make and vend the patented machine, and the grant of the right to use it." They say: "A patentee, when he has himself constructed a machine, and sold it, without any conditions, or authorized another to construct, sell, and deliver it, or to construct, and use, and operate it, without any conditions, and the consideration has been paid to him for the thing

patented, the rule is well established, that the patentee must be understood to have parted, to that extent, with all his exclusive right; and that he ceases to have any interest whatever in the patented machine so sold and delivered, or authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee, or his assigns." Mr. Wheeler had authorized these defendants, being customers of the Wheeler and Wilson Company, to construct, and use, and operate, without any conditions, fifty-six binders. The consideration for this grant was paid to the owner of the patent by the purchase of Wheeler and Wilson sewing-machines. The defendants thus became owners of the guides which they used, and, by such ownership, and the right which they acquired from Mr. Wheeler, they acquired the right to use and operate the machines until they were worn out. They were not simply licensees of the right to use a machine of which they were not the owners, but the machines had become their "private, individual property." "Complete title to the implement or machine purchased becomes vested in the vendee by the sale and purchase, but he acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser, ceases to be within the limits of the monopoly." (*Mitchell v. Hawley*, 16 Wall., 548.)

I perceive no substantial difference between the case of these defendants and the case of the complainant against Gilmour, which was an application for a temporary injunction against the use of certain Douglas guides, and was decided by Judge Blatchford, April 29th, 1873. Gilmour, prior to the expiration of the original term, was in the use of four Douglas guides, upon as many Wheeler and Wilson sewing-machines. It is true, that Mr. Wheeler's affidavit in the Gilmour case contained a more detailed statement of the char-

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acter and extent of the license, than was given in his deposition in the present case; but the facts which he stated are the same in each case. In the Gilmour affidavit he says: "I intended that all patrons of the Wheeler and Wilson Manufacturing Company should be at liberty to make and use Douglas binders whenever and wherever they wished, without charge or liability of any kind, to anybody. \* \* \* All parties were told to make their own binders. I permitted the employees of the company, for the convenience of parties using Wheeler and Wilson machines, to make Douglas binders for them, and retain to themselves the prices paid. Full liberty and license was given all persons using Wheeler and Wilson machines, to use, in their business, without charge, all the Douglas binders they had in use when I became an owner in the Douglas patent before named, and to procure where they pleased, and continue to use, until worn out, all additional Douglas binders that their business required." Upon these facts, Judge Blatchford held, that, "within the principle laid down in *Wyeth v. Stone*, (1 *Story*, 273,) it is quite clear, that, as against Wheeler, who was the sole owner of the Douglas patent for more than four years before it expired, the defendant was in the lawful use, before and at the time the first term of the patent expired, of the four binders he was using when such first term expired. Wheeler could not have been heard to stop the defendant from the use of such four binders. The defendant was, within the meaning of the 67th section of the Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 209,) a grantee of the right to use such four binders, and, therefore, has a right to use, until they are worn out, the identical four binders which he was using when the first term of the patent expired. As to all other binders, the injunction is granted."

After the reissue, and before the filing of the bill, the defendants caused to be made, and used in their business, from fifteen to eighteen "two-line" binders, which were supposed not to have been included in the reissue. Upon ascertaining that these binders were Douglas binders, the defendants

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caused them to be destroyed, in March or April, 1873. For the use of these binders the defendants are liable.

Let there be a decree, without costs, for an account of damages and profits for the use of these last named binders prior to their destruction, and an injunction against the use of binders described in the reissued patent, other than the identical forty-six binders which are now in lawful use.

*Frederic H. Betts* and *William D. Shipman*, for the plaintiff.

*Solomon J. Gordon*, for the defendants.

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HENRY D. STOVER AND J. A. FAY & Co.

*vs.*

## EZEKIEL S. HALSTED AND GILBERT W. MERRITT. IN EQUITY.

The 3d claim of letters patent granted to Henry D. Stover, July 23d, 1861, for an "improvement in planing-machines," namely, "The arrangement of matching cutters, to be adjusted both laterally with each other, and vertically upon the bed-piece, essentially as described, in combination with the platen, so that the planing and matching of the piece may both proceed at the same time, or either the planing or matching may be done separately, whether the platen be made movable with the piece secured thereupon, or the platen be fixed, and the piece be made to move thereon," is a valid claim. Although lumber cannot be matched upon a movable platen by the machine, because the matching spindles project through apertures in the platen, and would, when in a position for matching, prevent a forward movement of the platen, yet, as the description of the machine in the specification shows that no such mechanical impossibility was contemplated, the claim must be so construed as not to involve such impossibility.

The question of the infringement of said 3d claim, considered.

Said 3d claim is infringed by the devices described in letters patent granted to Rufus N. Meriam, November 5th, 1867, for "improvements in planing machines."

Said 3d claim is not void for want of novelty.

(Before SHEPMAN, J., Southern District of New York, August 3d, 1875.)

SHIPMAN, J. This is a bill in equity, praying for an injunction and an account, and is founded upon letters patent for an "improvement in planing machines," which patent was issued to Henry D. Stover, one of the complainants, on July 23d, 1861. The other complainants, J. A. Fay & Co., are a corporation, and the assignees and owners of an undivided half interest in so much of the patent and of the invention covered thereby as is embodied in the third claim of said patent. The assignment was executed September 14th, 1868. The answer admits that said patent was issued to said Stover, and puts the complainants to proof of their present title thereto, and alleges that the patent is void for want of novelty. The defendants deny that they have infringed, by averring that the only machines which they use, or have used, for planing or matching lumber, are machines made under letters patent which were granted to Rufus N. Meriam on November 5th, 1867, and which patent is alleged to have been for a "different invention from that claimed by said Stover in his patent." The answer also avers that the complainants are equitably estopped, by their own acts, from any recovery in this suit. The fact that J. A. Fay & Co. are a corporation, is, in effect, admitted by the pleadings.

The machine to which the alleged improvements in each of the patents relate, is a machine for planing and matching lumber. Machines for planing the surface of boards, and at the same time for planing or grooving and matching the edges of boards, have been long in use, and were well known prior to the date of the Stover patent. In these machines, the boards were planed by means of a cylinder, which occupied a horizontal and transverse position above the bed or platen upon which the boards were placed, and the edges of the boards were, at the same time, grooved and matched by means of matching cutters. These cutters were attached to spindles which were supported in a vertical position, so as to project through and above the bed, and thus enable the knives to operate upon the edges of the lumber as it passed between the knives after leaving the planing cylinder. The machines

were also provided with mechanism, by means of which the space between the matching cutters could be increased laterally, so that stuff of different widths could be matched upon the same machine. Although, in the machines which were in use prior to the Stover patent, there were devices which caused a slight vertical adjustment of the matching cutters upon their spindles, so that lumber of different thicknesses could be matched, yet there was no machine in which the matching apparatus could be entirely removed, by mechanical means, below the surface of the platen, when the surfacing of wide boards only was desired. Oftentimes there was a necessity for planing, without matching, boards of greater width than would pass between the matcher heads, and, in such case, it was necessary to detach and to remove, by hand, the spindles from the machine. It was thus impossible to surface wide boards upon a machine of ordinary dimensions, without incurring the labor and delay which were incident to a removal of the matching mechanism by hand. One object of the machines of Stover and of Meriam was to obviate the difficulty, and each patentee adopted the same general mode of accomplishing the desired result. The matching spindles are so attached to each machine that they can, at the pleasure of the operator, be simultaneously dropped below the surface of the platen. In the Stover machine, the platen is movable or stationary. When boards are to be both planed and matched, the platen is stationary, and the lumber is passed under the cutting cylinder, by feed rolls, to be planed, and thence between the matching cutters, to be matched. When boards are to be planed without being matched, they can be placed and secured upon a movable platen, which, with the lumber upon it, is passed under the cutting cylinder. But the platen cannot be moved without previously removing the matching spindles, which would, if not removed, prevent the progress of the platen. The objects of the Meriam machine are described by the patentee, in his specification, as follows: "In that variety of planing machines designed not only for planing the surface of lumber but also for matching the

edges thereof, much inconvenience has resulted from the necessity of lowering that portion of the bed of the machine which supports the upper ends of the vertical shafts which carry the matching cutters, whenever it is required to adjust the said cutters for matching lumber of different thicknesses, or to move the said shaft out of the way in using the planes for surface planing only. The object of this invention is to remedy this defect." One result which was intended to be accomplished by each machine, was the lowering of the shafts beneath the surface of the bed, when it was desired to use the machine for surfacing and not matching.

The defendants place their defence upon three grounds: (1st,) that the third claim of the Stover patent, which claim alone the defendants are charged with infringing, describes a mechanical impossibility and a machine destitute of utility; (2d,) that the Stover patent is void for want of novelty; (3d,) that the Meriam machine is not an infringement of the Stover patent.

(1.) Is the 3d claim of the plaintiffs' patent valid? The claim is as follows: "I also claim the arrangement of matching cutters, to be adjusted both laterally with each other and vertically upon the bed piece, essentially as described, in combination with the platen, so that the planing and matching of the piece may both proceed at the same time, or either the planing or matching may be done separately, whether the platen be made movable with the piece secured thereupon, or the platen be fixed and the piece be made to move thereon." The defendants contend that the patentee is confined, by this language, to a mechanism whereby the lumber may be both planed and matched at the same time, or planing and matching may be done separately, either upon a movable or a fixed platen. It is obvious, that the lumber cannot be matched upon a movable platen by the Stover machine, because the matching spindles project through apertures in the platen, and the spindles, when in a position for matching, would prevent a forward movement of the platen; and it is also obvious, from the description of the machine, that no such



mechanical impossibility was contemplated. The specification is as follows: "To the platen A' is secured a guide D', which may be removed at pleasure; this correctly guides the board, in connection with the spring E', to be matched by cutters, which may be raised up through holes V<sup>2</sup> and W<sup>2</sup>, formed through the platen for that purpose, and adjusted at the desired elevation, they being driven by pulley S from pulley Q', on a drive shaft L'. The platen may thus be used stationary, and over which the boards may be moved by feed rolls, to be both planed and matched on both edges at the same time, or either may in the same manner be done separately, or the platen may be moved by any means (not necessary to be shown), and the lumber secured thereupon, while lying perfectly natural, by jaws F', operated by right and left hand screws G', to pinch and hold the piece, by turning the lever H'. \* \* \* \* In order to dress dimension lumber, the platen is moved in bed along with the piece secured upon it to be dressed; and, when boards are to be dressed by passing them under the cutting cylinder, requires that a set of feed rolls shall be combined with the other portions of my machine, to feed the boards or pieces over the platen A' and under the cutter, to be dressed, the platen being fixed during such operation." The intention of the patentee was to state in the third claim the improvements which he had described, and which consisted in part of devices for the removal by mechanical means of the matching apparatus when "dimension" lumber was to be dressed, that is planed and not matched. The third claim is not expressed with accuracy, but should be construed "*ut res magis valeat quam pereat*," and in connection with the specification, so that "the inventor shall have the benefit of what he has actually invented." (*Woodman v. Stimpson*, 3 Fisher's P. C., 98.) "If the Court can clearly see what is the nature and extent of the claim, by a reasonable use of the means of interpretation of the language used, then the plaintiff is entitled to the benefit of it, however imperfectly and inartificially he may have expressed himself." (*Ames v. Howard*, 1 Sumn., 485.) The

inventor intended to claim a surfacing and matching machine, in which the matching cutters were adjusted laterally and vertically, in combination with the platen, and were so adjusted vertically that the matching mechanism could be mechanically dropped below the platen, when surfacing alone was to be done. By such a machine the matching and planing could be done at the same time, or the planing could be done separately with the matcher cutters removed, or the matching could be done separately when the cutters were raised above the surface of the platen. He had previously claimed the movable platen, which he supposed to be an improvement upon other planing machines. The movable or fixed character of the platen is not a necessary part of the improvement to which the third claim relates, and might have been omitted from the statement of that claim. A construction which should compel the patentee to the declaration that his machine could either match or plane boards when placed upon a movable platen, the matching cutter being upon stationary arbors projecting through the platen, would be a construction of the utmost rigor, and in violation of the liberal rules in regard to the interpretation of patents, which have prevailed in Courts of this country. It is a just and reasonable construction to hold, that the concluding clauses of the claim were introduced parenthetically, and related to the platen which the patentee had previously claimed, and had no reference to the planing or matching which are mentioned in the clauses which immediately precede those now under discussion. Thus construed, the claim would read as follows: "I also claim the arrangement of matching cutters, to be adjusted both laterally with each other, and vertically upon the bed piece, essentially as described, in combination with the platen, (whether the platen be made movable with the piece secured thereupon, or the platen be fixed and the piece be made to move thereon,) so that the planing and matching of the piece may both proceed at the same time, or either the planing or matching may be done separately."

(2.) Does the Meriam machine infringe the complainants'

patent? The object of the Meriam machine has already been given in the language of the patentee. One object was to "move the shaft out of the way, in using the planer for surface planing only." He also states, that, "by this arrangement, they" (*i. e.*, the vertical spindles) "can be lowered beneath the surface of the bed, for surface planing only, without removing any portion of the bed, and in a moment of time." In the Stover patent, the device by which the matching cutters are dropped below the surface of the platen is thus described: "The matching cutters and bar X<sup>2</sup> are made vertically movable and adjustable by sliding in grooves *n*, which are formed in central portion of bed piece A, by means of screw O<sup>1</sup>, threaded and fitted to stand P<sup>1</sup> on bar X<sup>2</sup> and turned by wheel N<sup>1</sup>." By this single screw the two spindles are simultaneously moved above and below the surface of the platen. The same simultaneous movement is effected by double racks instead of by a single screw, as in the model which was used upon the trial. The same movement is effected in the Meriam machine by racks, pinions and a weighted lever. The mechanism is thus described by one of the defendants' witnesses: "This is accomplished by two separate sliding steps, having their motion vertically, each step provided with a rack in which mesh two pinions connected together by a longitudinal shaft. By rotating this shaft, it gives to the sliding steps which carry the matcher spindles a vertical motion sufficient to raise them to their places when performing their work, or depress them entirely out of the way." The elevation and depression of the matcher spindles in the two machines is performed by substantially the same means, and in substantially the same way. It is true, that the Meriam machine is probably an improvement upon the Stover machine, but the principle and essential elements of the two machines are the same.

It is claimed that the Meriam machine does not infringe the plaintiffs' patent, because the specifications of the Stover patent describe no method by which a lateral movement of the matcher spindles can be produced. A lateral movement of the matching mechanism was well known prior to the date of

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the Stover patent, which was not granted for any improved lateral adjustment. The third claim was for the arrangement of matching cutters, to be adjusted both laterally and vertically, as described, in combination with the platen. The method of vertical adjustment is described and claimed. Any appropriate and customary method of lateral adjustment could be used, and one method was indicated in the drawings, but, as the patentee claimed no improvement in the mechanism by which lateral motion was obtained, it was not important to give a description of any particular method of accomplishing this result, when the methods already in use were well understood.

The third claim of the Stover patent is for "an arrangement of matching cutters." In the Meriam machine the cutting blades are placed upon "heads" of larger diameter than that of the spindles to which the heads are attached, the heads are removed from the spindles by hand, and the spindles are then dropped below the surface of the platen. In the machine which was shown in the Stover patent the cutting blades are inserted in slots in the end of the spindles, and are raised and depressed with the spindles. It is contended that the Stover patent is limited to an arrangement of cutters or knives which must be lowered by mechanical means, and that the patent is not infringed, by reason of the fact that, in the Meriam machine, the matching spindles only are carried below the platen. The object of the Stover invention was to enable wide surfacing to be done upon a planing and matching machine of ordinary width. To accomplish this object the entire matching apparatus must be removed below the surface of the platen. In the Stover machine, as shown in the drawings, the spindles and cutters are simultaneously dropped. The cutters cannot be lowered unless the spindles are lowered also, and, unless the spindles are lowered, the machine cannot plane wide boards. The invention was for an arrangement of the cutting mechanism, and it would have been a more accurate use of language, had the word "mechanism," or an equivalent term, been used, instead of the word "cutters;" but, by a common form of ex-

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pression in the language which was employed, a part of the mechanism was substituted for the whole.

But, in case a limited signification is given to the word "cutters," the conclusion for which the defendants contend is not reached. The cutters or knives must be placed upon spindles, and the "arrangement of matching cutters" is an arrangement upon spindles which are so vertically adjusted that the whole can be dropped below the surface of the platen. The matching spindles of the Meriam machine are so vertically adjusted that they can be lowered below the surface of the bed, and, in the mechanism by which the dropping of the spindles is effected, the Stover patent is infringed. The Meriam machine "incorporates in its structure and operation the substance" of Stover's invention. (*Carter v. Baker*, 4 *Fisher's P. C.*, 404.)

(3.) The novelty of the Stover machine. It has already been remarked, that machines which were in use prior to the Stover patent contained devices for a slight vertical adjustment of the matcher cutters, so that boards of different thicknesses could be accurately matched. This vertical adjustment was sometimes effected by a thread at the upper end of the spindles, and sometimes by loosening a set screw which secured the cutter head to the spindle. These machines did not contain any device by which the spindles could be simultaneously dropped below the surface of the platen at the will of the operator, so that boards could be planed which were wide enough to pass over the top of the spindles thus lowered. Upon the entire proofs it does not appear that any machine existed prior to the date of the Stover patent, which had the principle of the Stover machine.

(4.) As to equitable estoppel. The testimony in regard to Stover's propositions to a witness, and one of the manufacturers of the Meriam machine, is, if true, not sufficient to justify a Court in dismissing the bill.

Let a decree be passed for an injunction and an account.

*Samuel A. Duncan* and *George Gifford*, for the plaintiffs.

*Abbett & Fuller*, for the defendants.

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Stevens v. The New York and Oswego Midland Railroad Company.

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JOHN G. STEVENS AND OTHERS, TRUSTEES, &amp;C.

vs.

THE NEW YORK AND OSWEGO MIDLAND RAILROAD COMPANY  
AND OTHERS. IN EQUITY.

There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a Court of justice, for the purposes of a suit pending in such Court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the Government within whose jurisdiction such property is situated.

Except under very special circumstances the power of taxation ought not to be interfered with by injunction.

In a suit pending in this Court for the foreclosure of a mortgage given by a railroad corporation, receivers of the mortgaged property were appointed by this Court. They applied to this Court to enjoin certain tax collectors from executing warrants for taxes assessed on the mortgaged property, on the ground of irregularities in the assessment of the taxes. So far as appeared, the warrants were regular on their faces and the tax collectors were acting thereunder in good faith, in the discharge of their duty. The injunction was refused.

(Before BLATCHFORD, J., Southern District of New York, August 17th, 1875.)

BLATCHFORD, J. This is a suit for the foreclosure of a mortgage on certain property owned by the New York and Oswego Midland Railroad Company, a corporation. Pending the suit, John G. Stevens and Abram S. Hewitt have been appointed by this Court receivers of the mortgaged property. They now apply to this Court, by petition, for injunctions to restrain the tax collectors of certain towns in the State of New York from proceeding to interfere with the property which is in the hands of such receivers, by selling it under warrants to satisfy certain State taxes. One ground of the application is, that the imposition of taxes on the corporation, or its property, is in violation of the Constitution of the United States, as impairing the obligation of a contract made between the State and the corporation. This question has

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heretofore, on a separate argument, been decided by this Court adversely to the receivers. (*Hewitt v. N. Y. & Oswego Midland R. R. Co.*, 12 *Blatchf. C. C. R.*, 452.) The matter has now been argued upon objections made by the receivers to the mode of assessing the taxes.

But, a preliminary point is taken, that this Court will not, in this way, examine the questions raised as to the regularity of the assessment of the taxes. The tax collectors are not parties to this suit. This Court is not a tribunal to which any direct power is confided to supervise or review the regularity of the assessment of the taxes, as on *certiorari*. Nor are the questions raised between the adversary parties to a plenary suit, with its regular procedure in the way of trial and opportunity for review, but they are brought up on motion, in a collateral action. It is, however, contended for the receivers, that the property in their possession is in the possession of this Court; that such possession cannot be disturbed without the consent of this Court; and that, before this Court will consent to part with the possession of the property which may be required to pay the taxes, it will assure itself that the tax collectors are lawfully entitled to subject it to the claims for taxes.

I have heretofore decided that the property in the hands of the receivers was properly assessed as the property of the corporation. There is no prerogative of sovereignty which is of higher importance than the power of taxation, which includes the collection, as well as the assessing, of the taxes. The very existence of the State as a Government depends upon the exercise of such power. Except under very special circumstances, such power ought not to be interfered with by injunction. The promptness and regularity of the collection of taxes are as important to the welfare and credit of the Government, and to its capacity to fulfil its functions, as is the collection itself. If any person is aggrieved by the exercise of the authority of the tax collector, he has an adequate ultimate remedy in an action against the wrong-doer, with the preliminary remedy afforded, of directly reviewing

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the proceeding according to the method, and before the tribunal, provided by the laws of the Government under whose authority the proceeding takes place. There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a Court of justice, for the purposes of a suit pending in such Court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the Government within whose jurisdiction such property is situated. So far as appears, the warrants in the hands of the tax collectors are regular on their faces, and the tax collectors are acting thereunder in good faith, in the discharge of their duty. Under such circumstances this Court would not hold the collectors to be guilty of a contempt of this Court for levying on the property of the corporation to satisfy the taxes specified in the warrants. That being so, this Court will not undertake to determine, on affidavits, and in a collateral suit, the questions raised as to the irregularities alleged to have existed in the assessment of the taxes, or to enjoin the tax collectors from executing the warrants.

The applications for injunctions must be denied and the temporary injunctions must be dissolved.

*Ashbel Green*, for the receivers.

*John C. Churchill, John C. Perry, E. More, Holmes & Smith, Henry W. Wiggins, Amos G. Hull, Archibald C. Niven, L. B. Kern, A. N. Sheldon and Stewart & Read*, for the tax collectors.



## Boomer v. The United Power Press Company.

GEORGE B. BOOMER AND RUFUS E. BOSCHERT

vs.

## THE UNITED POWER PRESS COMPANY AND OTHERS. IN EQUITY.

Letters patent were granted to George B. Boomer, Rufus E. Boschert and Thomas G. Morse, November 1st, 1870, for an "improvement in cheese presses." They were reissued to Boomer and Boschert, January 28th, 1873. The claim of the original patent was, "A cheese press, composed of the double frame A, a, A', the press beam B, b, H, sliding standards G, G, double levers C, C, nuts e, and the screw D, with a hand-wheel F, and square end d, all constructed, arranged and operating substantially as described." The claim of the reissue was: "In combination with the sliding standards, supported laterally and guided in the frame of the press, the double screw-shaft supported in or against the sliding standards, substantially as and for the purpose described." It was contended that the reissued patent was for a different invention from the original patent, because the claim of the reissue did not include in the combination the press beam, the double levers and the nuts. The invention was an improvement in a press in which double levers and a press beam were necessary, and they were fully described in the specification, and the only ingredients which entered into the invention were those specified in the claim of the reissue: *Held*, that the objection was not tenable. As the claim of the reissue embraces the improvement invented, and the elements of the invention are operative in connection with the mechanism described in the specification, the claim is not invalid because the elements specified in it do not, of themselves, accomplish anything.

The reissue is not invalid for want of novelty.

The plaintiffs, after bringing this suit, conveyed away their exclusive right to the patent for all of the United States, except the New England States and Ohio, reserving their rights "so far as they are connected with said suit, with the profits and damages therein, and the right to have said patent declared valid, and for an injunction:" *Held*, that the plaintiffs reserved no right to damages or profits for infringements committed after the conveyance, and were entitled to a decree for the damages and profits down to the time of the conveyance, but not to an injunction.

(Before SHIPMAN, J., Southern District of New York, August 23d, 1875.)

SHIPMAN, J. This is a bill in equity, filed February 5th, 1874, praying for an account and an injunction. Letters

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patent for an "improvement in cheese presses" were granted to the complainants, and to Thomas G. Morse, on November 1st, 1870. A reissue was granted to the complainants on January 28th, 1873, Morse having previously assigned his interest in the invention to Boomer. The United Power Press Company, one of the defendants, is a corporation established in the city of New York, of which corporation the other defendants are the trustees. The defendants are charged with the infringement of the reissued letters patent in the city of New York. The complainants, on April 10th, 1874, granted and conveyed to the Boomer and Boschert Press Company all their interest in the invention which was secured by the reissued letters patent, for all of the United States, except the New England States and the State of Ohio. On the same day the grantees executed an agreement, the material portions of which are as follows: "And whereas, a suit is pending against the United Power Press Co., instituted, among other things, to establish the validity of said reissued letters patent, and for an injunction; and whereas, said Boomer and Boschert have, in fact, assumed to have a good title to said letters patent, and the invention therein described, and have undertaken to carry forward said suit to a successful termination, if possible: Now, then, it is understood, that all their rights under said reissued letters patent, so far as they are connected with said suit, with the profits and damages therein, and the right to have said patent declared valid, and for an injunction, are not to be affected by said patent deed, but the same is subordinate to said rights." The answer avers that the reissued patent is not for the same invention for which the original letters patent were issued, denies the novelty of the alleged invention, and denies infringement.

The alleged invention of the patentees related to an improvement in that class of presses known as toggle-lever presses. An ordinary toggle-lever press consists of a frame having a base and head-block suitably connected by rods or posts, in which frame runs a follower. The follower is elevated or lowered by two toggle-levers jointed at their centres,

which levers are operated by a right and left-hand screw-shaft passing through the knuckles of the levers. The defect in this kind of press arises from the fact that, when the resistance under the follower is unequal, the follower tips at the end where there is the least resistance. This depression of the platen or follower, causes the arms of the lever on the side of greater resistance to become more angular than the arms of the opposite lever, and the lozenge-shaped configuration of the four arms of the levers becomes distorted. This distortion causes an endwise motion of the screw-shaft towards the side of the press where the arms of the lever are more angular, and the side of greater resistance. Consequently, the end or side of the press where the greatest pressure is needed, becomes least capable of exerting such pressure, and the action of the press becomes unequal. Prior to the complainants' invention, this defect in toggle-lever presses was of a very serious character, for the usefulness of such presses depends upon the uniformity with which the platen is kept level, and the uniformity of the pressure under the platen. The alleged invention of the patentees consisted in constructing sliding standards, the lower ends of which are attached to the platen, and the upper ends extend through a socket in the head-block. When one end of the platen is depressed, these standards tend to incline towards the side of least resistance, and in an opposite direction from that towards which the screw-shaft tends to move. In order that these opposing tendencies may be made to counteract each other, a central hub is attached to the screw-shaft between the standards. When the standards incline to the side of greatest depression, this central hub or bearing, being attached to the screw-shaft, comes in contact with the standard, prevents its further movement, and, at the same time, by its pressure upon the standard, prevents the movement of the screw-shaft to the side of greatest resistance. One of the patentees describes the manner in which the follower is kept level by this invention, notwithstanding the resistance may be greater under one side of the follower than under the other

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side, as follows: "It (the follower) will be kept level, or very nearly so, because, if the resistance is greater under, say, the right end of the follower, the tendency is to depress the left end, which would draw the standards to the left; but, if the follower is depressed at the left, the left pair of arms or toggle-levers will become straighter than those on the right, and the screw will move to the right, bringing its central bearing in contact with the standards, which will prevent both the movement of the screw to the right and the standards to the left. The two opposite movements are thus made to counteract each other, and the power of the press is kept in equilibrium." The principle of the invention is, that the active force exerted by the movable standards and the hub, at the instant when the tendency of the screw-shaft to deflect commences, is more efficacious than a much greater amount of resistance which can be exerted by fixed bearings or posts, and that the tendency to distortion is easily overcome by making the opposite movements of standards and screw-shafts to counteract each other. The press of the plaintiffs has been largely sold, and is a highly useful improvement.

The two styles of machines which the defendant corporation manufactured and sold, in the city of New York, prior to April 10th, 1874, differ only in immaterial details from the press of the complainants. In the defendants' press there is but a single sliding standard, and, instead of the complainants' central hub, collars are attached to the screw-shaft on each side of the standard. It is virtually conceded by the witnesses for the defendants, that their machines embody the invention which is claimed in the complainants' reissued patent, and differ from the complainants' machine in form only and not in substance.

The defendants contend, first, that the reissued patent is void, because it is not for the same invention as the one which was claimed in the original patent. The claim in the original patent was as follows: "A cheese press, composed of the double frame *A, a, A'*, the press-beam *B, b, II*, sliding standard *G, G*, double levers *C, C*, nuts *e*, and the screw *D*, with a hand-wheel *F*, and square end *d*, all constructed, arranged

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and operating substantially as described." The reissued patent also contains a single claim, as follows: "In combination with the sliding standards, supported laterally and guided in the frame of the press, the double screw-shaft supported in or against the sliding standards, substantially as and for the purpose described." The defendants insist that two material parts of the originally patented invention, to wit, the press-beam or platen, and the toggle-levers and nuts, have been dropped in the reissued claim, and that these omissions constitute a material change in the reissue, as compared with the original patent, and that the reissued patent attempts to secure combinations fewer in number than the whole described in the original patent. The improvement which is declared in both the original and reissued patents to have been invented by the patentees, is an improvement in a toggle-lever press, in which toggle-levers and a platen must necessarily be found. The specification of the reissued patent describes fully, and in substantially the same terms which are employed in the original patent, the manner in which the whole press is constructed. The claim of the reissued patent embraces, in comprehensive terms, the actual invention, and describes what is claimed to be new, and it was not necessary to mention, in that part of the specification, that toggle-levers and a platen were also used in the press. The only ingredients which entered into the invention for which the original patent was granted, are those which are specified in the claim of the reissued patent.

The defendants insist, in the next place, that the complainants' patent is invalid, because the elements which are specified in the claim as forming, in combination, the invention, do not of themselves perform or accomplish anything. The claim is properly confined to the invention, and specifies only the improvement which the patentees invented. The elements of the invention are operative in connection with the mechanism of the press, which is accurately described in the specification.

The defendants contend, thirdly, that the complainants' patent is void, in view of the previous state of the art, as

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shown in the presses which are described in the patent of Robert Harding, of September 3d, 1842; in the patent of P. G. Gardner, of February 28th, 1845; in the patent of Nathan Chapman, of January 12th, 1858; in the patent of Pickens B. Wever, of August 21st, 1860; and in the French press of P. Samain. No one of these presses contained the combination of sliding standards with the central hub of the complainants' press, and no one was constructed upon the principle of keeping the platen level by means of the active resistance which standard and hub make to the tendency of the screw shaft to move towards the side of greater resistance, when the platen commences to tilt. The point upon which the defendants most strongly relied, in this part of the case, was, that the sliding standard of the Harding press and the central hub or wheel of the Gardner press could have been combined, and thus the complainants' press could have been constructed without the exercise of invention. This theory is not supported by the facts, and it is manifest that an operative machine could not, prior to the date of the complainants' invention, have been constructed from a combination of the two machines of Gardner and Harding, without inventive skill of more than ordinary character.

The remaining question is as to the terms of the decree. The complainants, on April 10th, 1874, and after suit had been brought, granted to the Boomer and Boschert Press Company the exclusive right to the reissued patent for all of the United States, except the New England States and the State of Ohio. The grantees, having obtained, by this grant, the exclusive right and title to the patent for the State of New York, and having recorded the deed in the patent office, could alone institute suit for any infringement which might be committed after the date of the grant, within that State. (*Moore v. Marsh*, 7 Wall., 515, 521.) The complainants had parted with all their previous title in the patent for the territory which was named in the grant. The grantees declared, in the agreement which they executed, and which was dated April 10th, 1874, that all the rights of the complainants, "so far as they are connected with said suit, with the profits

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and damages therein," are not to be affected by the deed. By this language, the grantees did not confer upon the complainants any right to damages for future infringements, and did not declare that any such right was understood by the parties to the grant to have been reserved. The grantors made no express reservation in their deed, and retained nothing but their right to recover whatever sums might be determined to belong to them for infringements which had theretofore been committed. The "rights under said reissued letters patent, so far as they are connected with said suit," were the rights which they had to obtain compensation for the damage which they had previously suffered, and "the profits and damages therein," which were declared not to have been affected by the grant, were simply those profits and damages which they might then be entitled to recover. The complainants aver, in their bill, that they are the exclusive owners of the reissued letters patent for the State of New York. Since the filing of the bill they have conveyed all their title to the patent for that State, and are not now entitled to an injunction against an infringement therein. (*Wheeler v. McCormick*, 11 *Blatchf. C. C. R.*, 334, 345.) The understanding or agreement of the parties, that the right of the complainants to an injunction should not be varied by the grant of April 10th, 1874, does not alter the legal effect of that conveyance. If it had been averred in the bill, or in a supplemental bill, that the complainants are the owners of the patent for the New England States and the State of Ohio, and that the defendants are infringing, or threaten to infringe therein, this Court could enjoin against such unlawful use. (*Wilson v. Sherman*, 1 *Blatchf. C. C. R.*, 536.)

Let there be a decree for the complainants, declaring the infringement, and directing an account of profits and an ascertainment of damages until April 10th, 1874, with costs.

*William B. Smith* and *Andrew J. Todd*, for the plaintiffs.

*John Van Santvoord*, for the defendants.

## GEORGE L. NEWELL AND OTHERS

vs.

## GEORGE WEST AND OTHERS. IN EQUITY.

R., the patentee and owner of letters patent, agreed with M., shortly before the patent expired, that he would apply for its extension, and assign the extension, if obtained, to M., and M., in consideration, paid to R. \$500, and agreed to pay him \$1,500 more on receiving such assignment, and also the expenses paid by R. in procuring the extension. R. died without applying for the extension, and left a will appointing his wife his sole executrix, and making her and his daughter the sole beneficiaries. The will was probated in Massachusetts. Afterwards, a corporation, by assignment from M., acquired his rights under said agreement. Thereafter, the widow, as executrix, and acting in the interest of the corporation, applied for and obtained an extension of the patent, the corporation paid her the \$1,500, and she executed to it an assignment of the extended term, which assignment was recorded. The assignment was not made under an order of the Probate Court, and the daughter did not assent to it. In the assignment the widow was described as administratrix, and conveyed her interest as administratrix. After the recording of the assignment, she resigned her trust as executrix, and one I. was appointed administrator with the will annexed, and he, as such, conveyed to the plaintiffs the title on which this suit was brought: *Held*,

- (1.) That the corporation became the equitable owner of the patent, and the plaintiffs had constructive notice of such equity, by the recording of the assignment from the widow, before they procured the assignment from I., and were not *bona fide* purchasers; that, as against the plaintiffs, the corporation was entitled to a specific performance of the agreement to assign; and that, therefore, it was not material whether the assignment from the widow was invalid, because made by her as administratrix and not as executrix;
- (2.) That the assignment from the widow was valid, although made by her as administratrix;
- (3.) That the sale was not invalid because made without an order of the Probate Court, although there was a statute of Massachusetts providing that, on application, the Probate Court might order a sale of personal estate, inasmuch as there was no provision precluding a sale without such order;
- (4.) That it was not necessary the daughter should have joined in the assignment, or assented to it.

(Before WALLACE, J., Northern District of New York, August 24th, 1875.)



WALLACE, J. The complainants having filed their bill for a perpetual injunction, and for an accounting, alleging the infringement by the defendants of extended letters patent, in which the complainants own the exclusive right for the State of New York, the defendants plead thereto, that the Union Paper Bag Machine Company is the owner of the patent, in exclusion of the complainants. The complainants having taken issue by replication to the plea, the cause now comes on to be heard upon the pleadings and proofs.

The material facts, extricated from the mass of documentary and oral evidence contained in the proofs, a large portion of which seems utterly unimportant, are few and simple. The complainants claim title by an assignment from Ingalls, as administrator with the will annexed of Benjamin F. Rice, deceased, and the Union Paper Bag Machine Company claim by an assignment, prior in point of time, made by Roxanna Rice, while acting as executrix of the estate of Benjamin F. Rice. Benjamin F. Rice was the inventor of the improvement for which the patent was obtained. Shortly before the term of the patent expired, he entered into a written contract with one Morgan, who was a part owner of the patent, whereby Rice agreed to make application for an extension of the patent, and use all honorable means in his power to obtain it, and, when obtained, to set the same over to Morgan, and to execute an assignment thereof at any time, upon demand. Morgan, in consideration of the agreement on the part of Rice, paid Rice \$500, and agreed to pay him \$1,500 more upon the delivery of the assignment, and such sum in addition as Rice might expend in procuring the extension. Rice died without applying for the extension, the original term not having expired. He left a will, in which his wife Roxanna and his daughter were made the sole beneficiaries, and by which he appointed his wife sole executrix. Subsequently, the Union Paper Bag Machine Company became the beneficial party in interest in the agreement, in the place of Morgan, the latter having assigned his rights. Thereafter, Mrs. Rice, as the executrix of the inventor, and acting in the inter-

ests of the Union Paper Bag Machine Company, applied for and obtained the extension of the patent, and thereupon the latter paid her the \$1,500 which Morgan had agreed to pay her husband, and she executed to the company an assignment of the extended letters patent. This assignment was duly recorded. It recited the obtaining of the original patent by Benjamin F. Rice, his death, the extension of the patent, and her appointment as his *administratrix*, and purported to convey her interest as administratrix in the patent as extended. After this assignment was recorded, she resigned her trust as executrix, and Ingalls was appointed administrator of the estate with the will annexed, and he, as such administrator, conveyed to the complainants the title upon which they now rely.

It is insisted, on behalf of the complainants, that the assignment to the Union Paper Bag Machine Company by Mrs. Rice, as administratrix, when she was in fact executrix of her husband's estate, did not pass her title as executrix. It is also insisted, that, if it would have passed such title, it was not valid, because her daughter, as a legatee under the will, did not assent to the transfer, and because the sale was not made upon the order of the Probate Court. If it should be conceded that the assignment to the Union Paper Bag Machine Company was wholly invalid, it does not follow that the complainants acquired any title by the assignment to them. They cannot be heard to set up their assignment against the Union Paper Bag Machine Company, because the latter was equitably entitled to a conveyance of the title, and the complainants had notice of such equity when they procured an assignment to themselves. If Rice had lived and obtained the extended letters patent, Morgan, upon tendering performance of the conditions in the agreement on his part, could have enforced specific performance of Rice's covenant to convey. The inchoate right of an inventor to an extension of his patent may be the subject of a contract of sale (*Clum v. Brewer*, 2 *Curtis' C. C. R.*, 506); and a contract to convey such a right will be enforced by a bill for specific perform-

ance. (*Nesmith v. Calvert*, 1 Woodb. & M., 34.) Where an invention is assigned before it is patented, the assignor is estopped, upon obtaining the patent, from setting up any adverse title (*Herbert v. Adams*, 4 Mason, 15); and the doctrine applies with equal force where he has agreed to assign, because, in such case, the purchaser, upon tender of the purchase price, becomes the equitable owner of the patent. (*Hartshorn v. Day*, 19 How., 211.) If Morgan could have required specific performance by Rice, the Union Paper Bag Machine Company, as the party in interest in the place of Morgan, could have required it of Mrs. Rice, as executrix. The patent, when obtained by her, devolved upon her, as the legal representative of the inventor, "on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime." (Sec. 34, Act of July 8th, 1870, 16 U. S. Stat. at Large, 202.) The obvious intent of the law is, to vest in the legal representatives of a patentee, upon his death, the same rights he would have enjoyed if he had lived. The executrix had no higher rights than Rice would have had; and, when she received the \$1,500 which was to be paid upon the transfer of the extended letters patent, the Union Paper Bag Machine Company became the owner, in equity, of the patent. Its rights are the same as though that had been done which ought to have been done; and no one, except a *bona fide* purchaser, can now assert the contrary, in a Court of equity.

The recorded assignment was constructive notice to the complainants of the rights of the Union Paper Bag Machine Company. It was notice that the latter claimed to be the assignees of the patent which had belonged to the estate of the testator. It sufficed to direct the attention of a purchaser to the claim of an adverse title in the patent, and to enable the purchaser, by inquiry, to ascertain the extent of the right. Inquiry, at proper sources, would have revealed that Mrs. Rice, though not the administratrix, was the legal representative of her husband's estate when she executed the instrument, and that the consideration was received by her in her

representative capacity, thus indicating the right of the Union Paper Bag Machine Company to a reformation of the instrument by correcting the mistaken description of her representative character.

If these views are correct, it is immaterial whether the assignment made by Mrs. Rice to the Union Paper Bag Machine Company was valid to convey the title or not; but, in my judgment, it was valid to convey the title. It has been held, that an advertisement by an executor styling himself an administrator, is a legal advertisement of himself as executor, sufficient to permit him to set up the running of the statute of limitations, (*Finney v. Barnes*, 97 *Mass.*, 401;) and an averment of one as an administrator, who is in fact an executor, does not constitute a variance in a pleading. (*Sheldon v. Smith*, 97 *Mass.*, 34.) The instrument in question clearly indicates the intent of the assignor to convey as the legal representative of a person deceased. It recites the decease of the inventor, and that the patent was extended, and that she "was duly appointed his administratrix." The only effect which can be given to it is that of a transfer in her representative character; and, in view of the authorities which hold that, as descriptive terms, the words are practically synonymous, I have no hesitation in giving force to the instrument as a transfer of her title as executrix.

The objection that she had no right to dispose of the estate of her husband without the order of the Probate Court, is based on a section of the General Statutes of Massachusetts, which enacts, that, on the application of an administrator, or executor, or of any person interested in the estate, the Probate Court may order any part or all of the personal estate to be sold at public auction or at private sale, and, in that event, the executor or administrator shall account therefor at the price for which it sells. No authority is cited to sustain the position that this section precludes a sale without such order; and, in the absence of a statutory limitation, it is to be assumed that executors in Massachusetts possess the same power that they do at common law. The reasonable construction is,

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that the section in question was intended for the protection of executors, and to afford the aid of the Probate Court to them and to others interested in the estate, when particular circumstances may require it.

I do not understand that it is claimed that the daughter should have joined in the instrument in order to render the assignment valid at law. If the theory is that she was a *cestui que trust*, whose equitable rights have been disregarded, the sufficient answer is, that she had none except in the proper application of the money paid, because the Union Paper Bag Machine Company were the equitable owners of the patent.

For these reasons I am of opinion that the defendants must prevail upon their plea. A decree is ordered dismissing the bill, with costs.

*Marcus P. Norton*, for the plaintiffs.

*Horace Binney*, 3*d*, for the defendants.

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HUGO CARSTAEDT

*vs.*

THE UNITED STATES CORSET COMPANY. IN EQUITY.

The first and third claims of reissued letters patent granted to Hugo Carstaedt, November 19th, 1872, for an "improvement in take-up mechanism for looms for weaving irregular fabrics," the original patent having been granted to him March 30th, 1869, namely, "(1.) The two rolls B and C, continuously rotating at a suitable distance apart, and the series of sectional rollers or wheels D, mounted and operated so as to be pressed wedgewise between them when the take-up is to act, all substantially as and for the purpose herein set forth; (3.) A series of needles, *k, k*, in combination with a take-up composed of rollers or wheels D, arranged to take up at intervals on parts of the work, and to liberate other parts, substantially as and for the purpose herein

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specified," are not infringed by a mechanism in which the take-up is not effected by rollers divided in sections, and in which, although the effect of the take-up is sectional, such effect is due not to the sectional action of the take-up but to the action of the lay.

The second claim of said patent, namely, "(2.) The needles or points, *k, k*, fixed on a stationary bar *K*, and arranged, as specified, so that the fabric, being drawn by the take-up proper, is continuously carried across the needles, to be received by their points and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth," is not limited to the sectional take-up described in the patent, nor does it extend to every take-up, regular or irregular, but it embraces the combination of the needle-bar with any take-up mechanism for weaving irregular fabrics.

Thus construed, said second claim is not void for want of novelty.

A change of position of the needle-bar, as involving invention, considered.

(Before SHIPMAN, J., Southern District of New York, September 10th, 1875.)

SHIPMAN, J. The patent which is alleged to have been infringed by the defendants was granted to the complainant on March 30th, 1869, for an "improvement in take-up mechanism for looms for weaving irregular fabrics," and was reissued on November 19th, 1872. The patented machine was designed especially for the weaving of corsets. In weaving articles of irregular size, it is necessary to give greater fullness to one side or portion of the woven article, than is given to another portion. The cloth, notwithstanding this irregularity, is woven in one piece, so that "sometimes the weaving proceeds regularly across the whole width of the fabric," and sometimes irregularly across an increasing part of the width. The mechanism which "takes up" or carries along the woven cloth must be so constructed that the irregularly woven cloth shall be taken up, while the remainder of the cloth shall be kept stationary, and the edge of the entire width be kept in a straight line. One practical difficulty in accomplishing this result by the mechanism which was in use prior to the complainant's invention, arose from the fact that the cloth, having been beaten up by the reed, and taken up by the rollers, slipped out of them again when the lay was receding, because, in consequence of the fullness of a part of the cloth, the tension of the take-up upon the fabric was irregular, and the take-up

mechanism "drew" unevenly. The complainant's improvement consisted, in the language of his specification, of a "sectional take-up, composed of two rolls, continuously rotating at a suitable distance apart, and a series of sectional rollers mounted and operated so as to be pressed, wedgewise, between the two first-named rolls, when the take-up is to act; also, in a series of needles, or points, arranged upon a stationary bar, in such relation to the take-up rollers that the fabric is continually carried across said needles, to be received by their points, and to be arrested when a reverse motion of any part of the fabric is commenced; further, in the combination of a series of needles with a take-up composed of rollers or wheels D, arranged to take up, at intervals, on parts of the work, and to liberate other parts, so that, as the fabric, or any part thereof, is carried in by the take-up, it is withdrawn from the needles, but the needles prevent the fabric, or any part thereof, from moving back." The mechanism is clearly described in the specification, as follows: "B and C are rollers, continuously but slowly rotated by gearing, as indicated. The woven fabric, represented by *m*, is led under each of these, and between them and short rollers or wheels, which are peculiarly mounted below. The cloth is taken up or drawn forward by being pinched between the wheels D and the rollers B, C, and the former are pressed up, so as to take hold of the cloth firmly, or are let down so as to liberate it, according as the work requires. When all the wheels D are pressed up, the woven fabric is taken up uniformly over its whole breadth. When the rollers D, on one side of the cloth, are pressed up, and the rollers D, on the other side, are allowed to remain depressed, the cloth will be taken up only on the side where the cloth is pinched. \* \* \* K is a cross-bar, immediately behind the roller C, and provided with a series of needles *k*, in its lower edge, which catch in the goods, and prevent its being drawn back under any circumstances when the take-up mechanism releases it." The claims of the patent are as follows: "(1.) The two rollers, B and C, continuously rotating at a suitable distance apart, and the series of

sectional rollers or wheels D, mounted and operated so as to be pressed wedgewise between them when the take-up is to act, all substantially as and for the purpose herein set forth ; (2.) The needles or points *k, k*, fixed on a stationary bar K, and arranged, as specified, so that the fabric, being drawn by the take-up proper, is continuously carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth ; (3.) A series of needles, *k, k*, in combination with a take-up composed of rollers or wheels, D, arranged to take up at intervals on parts of the work, and to liberate other parts, substantially as and for the purpose herein specified." The fourth claim has no relation to the present suit.

The defendants' mechanism is also a take-up mechanism which is adapted to irregular fabrics, but is not "sectional" in its character. A sectional take-up is one which takes up the cloth "only on some parts of the fabric, while the rest remains unmoved ; that is, the rolls which are used to take up the cloth are divided in sections, and can be used independently of each other." The defendants' take-up consists of an endless sheet or sheets of rubber pressing the fabric against a roller. The pressure is regulated by set screws. All parts of the roller at all times bear with equal pressure against the whole width of the fabric. The effect of the take-up is sectional, but that effect is due not to the sectional action of the take-up, but to the action of the lay. The needle-bar of the defendants, in its construction and mode of operation, and in the effect which it produces, is substantially like the complainant's needle-bar. It has the same position in the loom with relation to the take-up, and is designed to accomplish, and does accomplish, the same result.

From this description of the two machines, it is obvious that the defendants' mechanism does not infringe the first or third claims of this patent. The defendants' take-up is materially unlike the corresponding part of the plaintiff's machine, and their needle-bar is not in combination with the



sectional rollers or wheels which are described in the plaintiff's patent.

The material question in this case is, whether the defendants' needle-bar is an infringement of the second claim, and the answer to this question depends upon the construction which shall be given to that claim. If the "take-up proper" is the patented take-up, then the second claim is not infringed. On the other hand, if the claim is to be construed as a claim for a combination of the needle-bar with any mechanism for taking up woven fabrics, whether regular or irregular, then, if the claim is not void for uncertainty and vagueness, it is void for want of novelty; for, as will be remarked more particularly hereafter, needle-bars in combination with take-ups upon looms for weaving regular fabrics have long been known. It will be observed, that, while the patentee describes his take-up as sectional in its character, and claims that the particular device which he has invented is a patentable improvement, yet, it is manifest that he did not intend to limit his second claim to a combination of his needle-bar with his improved ke-up, or with a sectional take-up. After describing the needle-bar, he states that "the working part of the loom, as well as the take-up, may be of any approved character," and, also, "for the purpose of operating the take-up, if a sectional take-up is used, I prefer the mechanism represented." These portions of the specification forbid a construction which should confine the patentee to a combination of the needle-bar with his own take-up. Such a construction would make the second and third claims identical, and would prevent the patentee from reaping the benefit of a part of the invention which he actually made, for his invention originally consisted of a needle-bar in combination with the take-up which was in use at the time of his experiments.

The claim should also be considered in connection with the subject-matter of the invention. The improvement did not consist in a take-up upon every kind of looms, but in mechanism which was especially adapted to the weaving of irregular fabrics. To that kind of weaving and to such improvements

therein that irregular fabrics might be woven mechanically, it is evident that the attention of the inventor was exclusively directed. I am, therefore, of opinion, that the take-up which is mentioned in the second claim does not mean every kind of take-up, or the take-up in every kind of looms, but refers only to take-ups which are designed or adapted to the weaving of irregular fabrics.

The remaining question is, whether or not the second claim of the patent, as thus considered, covers what was well known at the time of the invention by the patentee. A needle-bar is an old device, and has long been used upon hand corset looms. When so used, the needles hold the woven cloth, which is lifted by the weaver as the cloth is woven, is straightened by hand, and replaced upon the needles. This simple device is merely to hold the cloth firmly in its place while the new cloth is being woven, and does not anticipate a needle-bar working automatically, in connection with an automatic take-up. The device which is described in the patent of August 2d, 1853, to Joseph A. Scofield, and which is called "a spur jaw temple," is, in fact, a stationary needle-bar for holding the ends of regularly woven cloth, so as to present an even width to the lay. The pins or needles were so inclined "as to allow the cloth to be drawn over the tops of said pins as the lay beats up, and, from their inclination, preventing the cloth from receding during the backward movement of the lay." The unpatented devices which are described by the witnesses James Leggett, William H. Lord and A. J. Crossley were stationary needle-bars made of card clothing, or of brass pins, and were designed to hold the edge of the cloth even throughout its whole width, and to prevent the cloth from receding towards the lay, and from contracting in width. These devices were used in regular weaving only. No irregular weaving was ever attempted to be done by their aid, and it is not shown that, if the attempt had been made, it would probably have been successful.

A needle-bar in combination with a take-up, upon a loom for the weaving of irregular fabrics, performs the same gen-

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eral office which a needle-bar performs in a loom for regular weaving, that is, the fabric is received and arrested by the needle-bar when a reverse movement of the fabric has commenced; but, in the weaving of irregular fabrics, a difficulty is to be overcome in addition to the one which is experienced in regular weaving, and which additional difficulty requires that the needle-bar should be placed in a certain relation or position with reference to the take-up. If the take-up mechanism is not near to the place where the weaving is performed, the cloth being more full in some parts of the fabric than in others, and the take-up not having a firm hold upon the cloth, "the cloth wrinkles and doubles itself towards the centre," and is taken up irregularly. This difficulty is not experienced to the same extent in the weaving of regular fabrics, which are of the same width throughout, and upon which there is an even tension of the take-up throughout the entire width of the cloth. In order to obviate this fault, the take-up must be placed as close as possible to the needle-bar, which must also be placed as near as may be to the fell of the cloth. The complainant's needle-bar is placed in this relation to the cloth and to the take-up, and, by means of such position, it is enabled to accomplish a result which had previously been unattained in corset weaving, viz., the arresting of the fabric when it is released from the tension of the take-up, and so holding the cloth that it is prevented from doubling up in the centre, and, by this result, the mechanical weaving of irregular fabrics is now successfully practiced. The combination which produces this new and useful result is not simply a combination of the old needle-bar and the take-up, but the position of the needle-bar and its relation to the take-up and to the edge of the cloth has been so changed, that a new combination of devices has been, in fact, created, and the new combination has accomplished a new and useful result, which was "not attained by the action of the old devices," as they were arranged with relation to each other prior to the date of the plaintiff's invention. (*Hailes v. Van Wormer*, 7 *Blatchf.*

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*C. C. R.*, 452; *Marsh v. Dodge & Stevenson Mfg. Co.*, 5 *Official Gazette Pat. Off.*, 398.)

It is said that this change of position of the needle-bar required no inventive skill, but could have been made by any person conversant with loom mechanism. It is noticeable, that, while the complainant's patent and the patent to James Lyall for the devices which the defendants are using, both attribute importance to the position of the take-up mechanism with reference to the place where the weaving is done, the latter patent stating that "it is important that the point of tension from the take-up device should be as near to the reeds, at the extreme movement, as possible," yet, prior to the plaintiff's invention, corset weaving was not successfully practiced upon the looms which were then in use, and favorable results were only obtained after the complainant's needle-bar was applied to the existing looms. In view of the previous state of the art, it can hardly be doubted that the retaining device has materially assisted in overcoming the obstacles which interfered with the success of irregular weaving, and that the accomplishment of this result is due to the labor and skill of the complainant.

It is strongly contended by the defendants that the complainant's needle-bar is antedated by the needle-bar which is described in the French patent, dated October 2d, 1846, to Messrs. Bender, Baudier and Madame Gobert. The devices mentioned in the patent, and exhibited in the drawings, are somewhat complicated, but the needle-bar, which, in one part of the specification, is styled a rotary bar, seems to have been either a rotary bar, or a fixed bar attached to a movable traction box or traction slide, and not, in any proper sense of the word, a stationary bar. It did not, therefore, anticipate the bar of the complainant's patent.

As the patent of William P. Brown and his knowledge and use of the plaintiff's invention were not set up or referred to in the answer, the testimony in regard to the Brown take-up was not considered.

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Let there be a decree for an injunction against the use of the needle-bar, and for an account, with costs.

*John Van Santvoord*, for the plaintiff.

*George Gifford*, for the defendants.

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THE UNITED STATES *vs.* CHRISTIAN A. STIEN.

A defendant in an indictment moved to set aside a forfeiture of a recognizance given by him for his appearance to answer the indictment, on the ground of irregularities as to the time and place of calling him to appear, and of entering the forfeiture. He had absconded to avoid a trial on the indictment, and was a fugitive from justice: *Held*, that the motion must, for that reason, be denied.

(Before BENEDICT, J., Eastern District of New York, September 20th, 1875.)

BENEDICT, J. This is a motion made in behalf of Christian A. Stien, to set aside a forfeiture of a recognizance given by him for his appearance to answer an indictment found against him. The application is based upon irregularities as to the time and place of calling the defendant to appear, and of entering the forfeiture. The application is opposed upon several grounds—among others, that the defendant has absconded and fled the country, for the purpose of avoiding trial for the offences with which he is charged in the indictment referred to, and is now a fugitive from justice. The fact that the defendant has so absconded, not being denied, furnishes a proper ground for the denial of this motion, made as it is on behalf of the defendant. The presence of the accused in Court when any proceeding is being taken in his cause, made necessary by the law in many instances, is always desirable, and, under

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circumstances such as this case presents, a refusal to hear argument in absence of the defendant seems to be a proper course.

Nor should one under indictment be permitted to defy the authorities by flight, and, at the same time, through an attorney, to appeal to them to act in his behalf. (See *Matter of Genet*, 3 N. Y. Supreme Court Rep., 734; *Brinkley v. Brinkley*, 47 N. Y., 49.)

The motion is, accordingly, denied, without passing upon any of the questions raised as to the regularity of the forfeiture in question.

*Asa W. Tenney*, (*District Attorney*,) for the United States.

*John J. Allen*, for the defendant.

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HENRY WATERMAN

vs.

## WALLACE &amp; SONS AND OTHERS. IN EQUITY.

An assignment recited the granting of a patent to H., the assignor, and its re-issue, and that K. "is desirous of acquiring all my right, title and interest therein, in accordance with the terms and conditions of a certain deed of trust executed by him," and then conveyed to K., in trust, "all my right, title and interest of, in and to the aforesaid reissued letters patent and the invention thereby secured." Afterwards, K. gave a license to W., which recited that both of the patents, and the invention secured thereby, had been assigned, in trust, to K., "for and during the unexpired term for which the same have been granted, and for and during any and all terms to which they or either of them may be extended," and then granted to W. a license under both of the patents, "the same to be exercised during the unexpired terms for which the said patents are granted, and may be hereafter extended." Afterwards, the patent was extended: *Held*, that the license to W. expired with the original term of the patent.

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K. obtained, by the assignment to him, only the interest of H. for the original term.

An assignment of "the invention," after a patent has been issued, without any other language to indicate the intention of the parties, does not import a conveyance of the right to an extended term.

The written declaration of a trustee, in a conveyance to a third person, of property which had been previous'y conveyed to the trustee by his *cestui que trust*, cannot be used against the latter, to determine the intent of both parties in making the original conveyance, and to show the extent of the interest which the *cestui que trust* intended to convey thereby.

(Before SHIPMAN, J., Connecticut, September 22d, 1875.)

SHIPMAN, J. Letters patent of the United States for an improvement in "tempering wire and steel" were granted to Henry Waterman, on August 24th, 1858, were reissued on February 14th, 1865, and, on August 20th, 1872, were extended for seven years from the expiration of the original term. On September 1st, 1865, said Waterman assigned the "reissued letters patent, and the invention thereby secured" to Charles M. Keller. The assignment is as follows: "Whereas, I, Henry Waterman, of Brooklyn, in the State of New York, did obtain letters patent of the United States, bearing date August 24th, 1858, for improvements in hardening steel wire, which said letters patent were reissued to me on the 14th day of February, 1865; and whereas Charles M. Keller, of the city, county and State of New York, is desirous of acquiring all my right, title and interest therein, in accordance with the terms and conditions of a certain deed of trust executed by him, dated the 1st day of September, 1865—now this indenture witnesseth, that, for and in consideration of the sum of one dollar to me paid, and of the faithful performance, by said Keller, of the terms and conditions in said deed mentioned, I have assigned, sold and set over, in trust, and do hereby assign, sell and set over, in trust, all my right, title and interest of, in and to the aforesaid reissued letters patent, and the invention thereby secured. In witness whereof, I have hereunto set my hand and seal, this 1st day of September, 1865. Henry Waterman. [L. s.]" On November 1st, 1865, Mr. Keller licensed the defendants to use the

patented improvement. The portion of the license which is material to the present case, is as follows: "Whereas both of the said patents, and the invention secured thereby, were, on the 1st day of September, 1865, assigned, in trust, to the party of the first part, for and during the unexpired terms for which the same have been granted, and for and during any and all terms to which they or either of them may be extended, \* \* \* the party of the first part has agreed to, and by these presents does, grant severally to each of the before recited parties and their successors, the right, privilege or license, under both of the said patents, to harden and temper hoop skirt and other steel wire, the same to be exercised during the unexpired terms for which the said patents are granted, and may be hereafter extended, on the terms and conditions hereinafter specified."

The bill, praying for an injunction and an account, was filed January 13th, 1873. The defendants admit, in their answer, that they are using the patented process, and rely solely upon the license from Mr. Keller. The only question in this case, which has been tried upon the pleadings alone, is, whether the defendants' license expired with the original term of the patent. It is manifest, that the deed of Mr. Keller purported to give a license during the extended term, and declared that he had title to the invention during any extension which might be granted. It is not denied by the complainant, that, if Mr. Keller had such title, the defendants now have a valid and continuing license; but the complainant insists, that the assignee, having obtained merely the interest of the patentee during the original term, could grant nothing beyond the expiration of that term. "No one, in general, can sell personal property, and convey a valid title to it, unless he is the owner, or lawfully represents the owner. *Nemo dat quod non habet.*" (*Mitchell v. Hawley*, 16 Wall., 550.) What, then, was the extent or duration of Mr. Keller's interest in the invention? "An assignment of an interest in an invention secured by letters patent is a contract, and, like all other contracts, is to be construed so as to carry out the intention of the parties to it. It is well



settled, that the title of an inventor to obtain an extension may be the subject of a contract of sale, and the inquiry is, whether the instrument of sale employed in this case did secure to the purchaser an interest not merely in the original letters patent, but in any subsequent extension of them." "There is no artificial rule in construing a contract, and effect, if possible, is to be given to every part of it, in order to ascertain the meaning of parties to it." (*Nicolson Pavement Co. v. Jenkins*, 14 Wall., 456.) It seems, also, to be the settled law in the construction of contracts of the character which is now under consideration, that a sale of "the invention" does not necessarily carry with it the exclusive right for the extended term, but, "where an inventor has, in terms, sold to another person a part of his invention, he has done that which is quite consistent with an intent to have that other person participate in all the rights which he, as inventor, can acquire by law." If, from the whole conveyance, or from a cotemporaneous written instrument which has been executed by the parties in relation to the assignment, and in connection therewith, the Court can discover that they intended to convey an interest in the invention for the extended term, a construction in accordance with the apparent intention will readily be given to the contract. This intention of the parties is ascertained, "not so much by reason of any superior force in the term 'invention,' as by other clauses which point to the extent and duration of the interest which was designed to be vested in the grantee." (*Clum v. Brewer*, 2 Curtis' C. C. R., 506; *Curtis on Patents*, § 208; *Ruggles v. Eddy*, 10 Blatchf. C. C. R., 52; *Mowry v. Grand St. & Newtown Railroad Co.*, Id., 89; *Nicolson Pavement Co. v. Jenkins*, cited *supra*.)

The deed to Mr. Keller, after reciting, that, whereas the grantor obtained letters patent, a description of which is given, and whereas the grantee is desirous of acquiring all the grantor's right, title and interest *therein*, *i. e.*, in the letters patent, assigns to the grantee "all my right, title and interest in and to the aforesaid reissued letters patent, and

the invention thereby secured." There is no *habendum* clause in the deed, which may make more evident the intention of the parties, and the language of the deed of trust which was executed by Mr. Keller is not contained in the bill or answer. The recitals in the assignment indicate that the conveyance of the reissued letters patent only was intended, and there is nothing in the deed to show that any other intention existed, unless it is to be found in the words "and the invention thereby secured." Until it is authoritatively decided that a conveyance of the letters patent and of the invention is, of itself, a conveyance of the inchoate right of the inventor to an extension, I am constrained to hold, in conformity with the weight of authority as it now exists, that an assignment of the invention, after a patent has been issued, without any other language to indicate the intention of the parties, does not import a conveyance of the right to an extended term. I do not understand that the Supreme Court, in *Nicolson Pavement Co. v. Jenkins*, (14 Wall., 452), intended to assert, that an assignment of the invention merely, conveyed the interest of the inventor to an extension. On the other hand, "that decision assumes, that an assignment of the invention, without words importing an intention to convey a present and a future interest, will not pass the right to an extension." (*Mowry v. Grand St. & Newtown Railroad Co.*, 10 Blatchf. C. C. R., 89.)

It is claimed, that the license from Mr. Keller to the defendants clearly shows the construction which he placed upon the assignment soon after it was executed, and is of weight in ascertaining the intention of the parties to the deed. The claim is not made, that an assignee of a patent can, by his subsequent deed to a third person, be able to enlarge the construction which would otherwise be given to the original conveyance, but, it is contended, that, as Mr. Keller was trustee for the complainant, he became, in a certain sense, the representative or agent of the patentee, and that the patentee is bound by the declarations of the trustee. It cannot, however, be admitted, that the written declarations

of a trustee, in a conveyance to a third person, of property which had previously been conveyed to the trustee by his *cestui que trust*, can be used against the latter, to determine the intent of both parties in making the original conveyance, and to show the extent of the interest which the *cestui que trust* intended to convey by his deed. Parol evidence of the declarations of both parties is not admissible to vary the legal effect of the assignment. (*Ruggles v. Eddy*, cited *supra*.) Neither can the written and solemn declarations of the grantee alone, subsequent to the deed, be permitted to enlarge the grant in his favor.

Although I am inclined to believe that there is a hardship in the position in which the defendants are placed, I am of opinion that it is a hardship from which they cannot be relieved under the present state of the decisions, unless the deed of trust which Mr. Keller executed and the patentee accepted, and which is referred to in the assignment, shows that it was the intent of the grantor to convey to Mr. Keller the extended term.

Let there be a decree for an injunction and an account.

*Charles F. Blake*, for the plaintiff.

*John S. Beach* and *William B. Wooster*, for the defendants.

## WILLIAM K. LOTHROP AND OTHERS

vs.

## JOHN W. STEDMAN AND OTHERS. IN EQUITY.

The Legislature of Connecticut, in 1866, chartered a life insurance corporation, reserving, in the charter, a right to alter, amend or repeal it "at the pleasure of the General Assembly." A statute of the State, passed in 1871, created the office of insurance commissioner, and provided, that, if it should appear to him that the assets of any life insurance company were less than its liabilities, he might petition the proper Court of Probate to appoint a trustee to take possession of its property for the benefit of its creditors, and made it his duty to so petition if it should appear that its assets were less in amount than three-fourths of its liabilities. S., the insurance commissioner, petitioned the Probate Court, setting forth that the assets of said corporation were less than three-fourths of its liabilities, and praying for the appointment of a trustee. After a full hearing on the merits, the petition was dismissed. Thereafter, the Legislature, by a joint resolution passed at its May session, in 1875, which contained sundry recitals, resolved, that said charter should, on the 1st of September, 1875, "be and become wholly and absolutely repealed and annulled," provided, that, if the corporation should, before said day, supply the deficiency existing in its assets, and receive from S. a certificate of a specified fact, the charter should remain in full force, and should not, by such resolution, be repealed or annulled, and provided that if S. and the corporation should disagree as to the amount of assets, their value and their sufficiency, two judges of the State Courts should determine the amount of such assets, their value and sufficiency, and certify the deficiency, if any, to be paid in, and, if the corporation should, within thirty days after the delivery of such certificate to the secretary of the corporation, pay in such deficiency, such resolution should become inoperative and void; that the decision of the judges should be made, and the certificate be delivered to the secretary, before November 1st, 1875; and that, in case the corporation and S. should disagree as to the value or sufficiency of the assets, and the corporation should not supply the deficiency on or before September 1st, 1875, S. should, on that day, take possession of all the assets, books and papers of the corporation, and hold the same "subject to the order of said Chief Judge, and to be disposed of as provided by law." A statute passed by the Legislature at the same session provided, that the title to the assets of life insurance companies, on the repeal of their charters, should vest in the insurance commissioner, who should dispose of them for the benefit of those interested in them,

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subject to the control of the proper State Court. The corporation did not, prior to September 1st, supply, to the satisfaction of S., the alleged deficiency, and disagreed with him in regard to the amount, value and sufficiency thereof. S. prepared to take possession of the property of the corporation, on September 1st, and prior to the investigation by the two judges. The corporation thereupon obtained an injunction *ex parte* from a State Court, to enjoin S., which, after a hearing, was, on motion of S., dissolved. S. also obtained an *ex parte* injunction from a State Court to restrain the officers of the corporation from disposing of its assets. The plaintiffs in this suit, holders and owners of policies of insurance issued by the corporation, filed this bill against S. and the corporation, alleging its solvency, and asking an injunction against S. from taking possession of its assets, and applied for a provisional injunction to that effect: *Held*, that such injunction must be refused.

It should be a very clear case to justify a Court in deciding that an Act of the Legislature is invalid, on a motion for a provisional injunction.

The principle, that a stockholder of a corporation cannot maintain a bill in equity against a wrong-doer, to prevent an injury to the corporation, unless it shall be averred, and shall affirmatively appear, that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor; and the plaintiffs are only creditors of the corporation.

When a charter or a general statute provides that such charter is subject to repeal by the Legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the Legislature has the right to exercise its powers summarily and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by Courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and, in such a case, a repeal, like other legislative acts which do thus violate the principles of natural justice, may be reviewed by Courts. The decision of the Court of Probate did not debar the Legislature from taking such legislative action as it deemed just.

A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into.

The Legislature has the right, as an administrative measure, to appoint a trustee, to take the assets and manage the affairs of a corporation whose charter has been repealed, in conformity with the general, just rules which it has prescribed, or with the rules of a Court of equity, if no statutory provisions have been enacted.

The resolution of repeal, in this case, was a legislative act, declaring the repeal and not the forfeiture of the charter, and the recitals in it were not in the nature of judicial findings of fact, but the statement of the reasons which operated upon the legislative mind.

By the resolution, in this case, the charter was repealed, but the repeal was not to take effect, or be operative, if a specified event should thereafter take place, which event was uncertain. The designation of the two judges, to determine

whether the event had taken place, was not a delegation of the power to determine whether the charter should or should not be repealed, but a delegation of the duty of ascertaining whether a fact existed, upon the existence of which the Legislature had determined that the repeal should not go into effect.

Even if the charter were in existence and unrepealed, the Legislature had the power to take away the custody of the assets of the corporation from its directors, and entrust the custody to an officer of the State, pending an investigation into the company's solvency, and the determination of the fact whether the event had happened on which a repeal of the charter would take place. Such power was derived from the reserved power of amending the charter at pleasure.

The effect of the action of the Legislature was to make S. a trustee, under the exclusive direction and control of a Court of equity, and subject to its decrees.

(Before SHIPMAN, J., Connecticut, October 1st, 1875.)

SHIPMAN, J. The American National Life and Trust Company was incorporated by the General Assembly of the State of Connecticut in the year 1866, under the name of the American National Life Insurance Company. The eighth section of the charter is as follows: "This resolve may be altered, amended, or repealed, at the pleasure of the General Assembly." A statute of the State, passed in 1871, relating in part to life insurance companies, and creating the office of insurance commissioner, provided, in substance, that, if it should appear to the commissioner, from any report, valuation, or examination of any life insurance company, that the assets of any such company incorporated by this State were less than its liabilities, the commissioner should, at his discretion, bring a petition to the proper Court of Probate, praying for the appointment of a trustee, to take possession of the property of such company for the benefit of its creditors, and, if it should appear that the assets were less in amount than three-fourths of the liabilities of such company, the Act made it imperative upon the commissioner to bring such petition without delay.

On November 23d, 1874, Mr. John W. Stedman, then and now insurance commissioner of this State, preferred his petition to the proper Probate Court, alleging that the result

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of an examination of the financial condition of the American National Life and Trust Company, and a valuation of its policies and assets, disclosed that the assets of the company were less than its liabilities, and less than three-fourths of its liabilities, and praying for the appointment of a trustee. After a full hearing, said Court, having called to its assistance a judge of the Superior Court, in pursuance of a statute of the State, found "that the allegation that such assets are less than three-fourths of the liabilities is untrue, that the allegation that the assets of said company are less than its liabilities is true, and the Court further finds that the deficiency is not such that the prayer of the petition should be granted," and dismissed the petition. The insurance commissioner presented to the General Assembly, at their May session, 1875, a special report upon the affairs of this company, and, at the same session, the Legislature passed the following joint resolution: "Whereas the American Mutual Life Insurance Company of New Haven has transferred its assets to the American National Life and Trust Company of New Haven, and has ceased business, said last named company assuming the liabilities of said American Mutual Life Insurance Company; and whereas, it appears from the report of the insurance commissioner relating to the affairs of said American National Life and Trust Company, that the liabilities of said company exceed its assets more than four hundred thousand dollars; and whereas, said company has neglected and refused to render to the insurance commissioner a report of its condition and affairs, as required by law; therefore, resolved by this Assembly, that the charter of said American Mutual Life Insurance Company and the charter of said American National Life and Trust Company shall, on the first day of September, A. D. 1875, be, and become wholly and absolutely repealed and annulled; provided, however, that, if said American National Life and Trust Company shall, before said first day of September, 1875, supply the deficiency existing in its assets, and receive from the insurance commissioner a certificate showing that the assets of said company are sufficient to

satisfy all outstanding and unpaid debts and claims, and to provide a full reinsurance reserve upon its policies in force, to be ascertained as now required by law, then the charters of said companies shall remain in full force, and shall not, by this resolution, be repealed or annulled; provided, further, if there shall be any disagreement between the insurance commissioner and said American National Life and Trust Company, as to the amount of assets, their value and their sufficiency, the Chief Justice of the Supreme Court of Errors shall, upon the application of either the insurance commissioner or said company, designate one of the judges of the Superior Court to sit with him, and they shall fully hear the parties and determine the amount of such assets, their value and sufficiency, and their determination shall be conclusive, and they shall thereupon issue their certificate of the amount of the deficiency, if any, to be paid in; and, if said company shall, within thirty days after the delivery of said certificate to the secretary of said company, pay in the deficiency therein stated, this resolution shall become inoperative and void. The decision of said judges shall be made, and said certificate shall be delivered to said secretary, before November 1st, 1875. And provided further, that, in case of a disagreement between the said company and the insurance commissioner as to the value or sufficiency of its assets, and said company does not supply the deficiency in its assets on or before the first day of September, 1875, the insurance commissioner shall then and thereupon, on said first day of September, 1875, take possession of all the assets, books and papers of said company, and hold the same subject to the order of said Chief Judge, and to be disposed of as provided by law." At the same session, the Legislature passed a statute in regard to the disposition of the assets of life insurance companies upon the repeal of their charters, providing, in substance, that the title of the assets of any such corporation should vest absolutely, and in fee simple, in the insurance commissioner, who should hold and dispose of the same for the use and benefit of the creditors and policy holders of such company, and such other



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persons as may be interested in such assets, and divide the avails in a specified order, and be subject to the direction and control of the Superior Court for the county within which the corporation should be situate. The American National Life and Trust Company did not, prior to September 1st, 1875, supply, to the satisfaction of the commissioner, the alleged deficiency in its assets, and disagreed with that officer in regard to the amount, value and sufficiency thereof. He made preparations to take possession of the property of the company on September 1st, 1875, and prior to the investigation by the Chief Judge and his associate. The company thereupon brought a petition before the Superior Court for New Haven county, to enjoin the commissioner against his proposed action. A temporary *ex parte* injunction was granted, which was dissolved by his Honor, Judge Beardsley, on motion of the insurance commissioner, and after a hearing of the parties. A temporary and *ex parte* injunction has also been granted by Judge Robinson, of the Court of Common Pleas, upon the petition of the insurance commissioner, to restrain the directors and executive officers of the company from disposing of its assets.

Sundry citizens of the State of New York who hold and own policies of insurance which have been issued by said company, or which it is liable to pay by virtue of lawful contracts heretofore entered into, have brought their bill in equity before this Court, against the commissioner and said corporation, alleging its solvency, praying that the commissioner be enjoined against taking possession of said assets, and that the company be enjoined against delivering such possession, mainly and principally upon the ground that the resolution of the General Assembly which has been quoted, and which is the foundation of the authority of the commissioner so to take possession, is void and of no effect. The reasons which are urged in support of this position will be stated hereafter. The complainants have also moved for the issuing of a provisional injunction to restrain the commissioner from taking possession of the assets of the company

until the final hearing of the bill, and, upon this motion, counsel for the complainants and for the commissioner have been heard at length. The only question now to be decided is, whether a provisional injunction should be granted:

• The general principles of law which are involved in this case are of great importance, and concern pecuniary interests in this country of no ordinary magnitude, and would justify me in taking more time for the consideration of this motion than I am now able to give. It is proper that the hearing which will soon take place before Chief Justice Park and his associate, in regard to the value of the assets of the company, should not be embarrassed by the pendency of any undecided motions in this Court, and it is due to the policy holders in the company, that they should be speedily apprised by the decisions of Courts in regard to the management of its property. These considerations demand a prompt decision, and prevent anything more than a succinct statement of the principles which I deem applicable to the case.

It is obvious, at the outset, that the question which I am asked to determine has always been considered by Courts one of grave importance. "The right of the judiciary to declare a statute void and to arrest its execution, is one which, in the opinion of all Courts, is coupled with responsibilities so grave, that it is never to be exercised except in very clear cases; one department of the Government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving, beyond all doubt, that it is so." (*Erie & N. E. Railroad Co. v. Casey*, 26 Penn. St., 287, per BLACK, J.) It should be a very clear case to justify a Court in deciding that an Act of the Legislature is invalid, upon a motion for a provisional injunction—a proceeding which addresses itself particularly to judicial discretion.

The defendant corporation is a stock corporation authorized to issue life policies upon the mutual plan of insurance, but it is not strictly a mutual insurance company, and the policy holders are not necessarily members of the corporation,

and have no right to participate in its management. The complainants appear before the Court only as creditors of the company. Being citizens of the State of New York, they have a right to bring this bill against the defendants, citizens of Connecticut, and their interest as creditors of the corporation, and *cestuis que trust* of the fund which is now in the control of the directors of the corporation, entitles them to maintain their suit, if they have suffered injury. The principle, that a stockholder of a corporation cannot maintain a bill in equity against a wrong-doer, to prevent an injury to the corporation, unless it shall be averred, and shall affirmatively appear, that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor.

It is suggested, that the questions in this case are the same as those which are stated in the petition of the insurance company now pending in the Superior Court, and that they have already been virtually passed upon by the decision of Judge Beardsley. While the decision of any judge upon a motion for a temporary injunction is not a controlling authority, yet it is true, that the same general questions which are here presented were discussed in the argument before Judge Beardsley, and the fact that an eminent judge of this State had, in effect, refused the injunction when it was urged by the insurance company, should properly lead me to exercise caution before I granted it in an action which, though brought by the policy holders, the affidavits on file in this case tend to show was instituted at the instance of the company.

The counsel in the case are not seriously at issue as to the principles which are applicable to the repeal of charters by Legislatures. A charter is a contract between the State and the corporators, and the corporation takes the grant subject to the limitations which are contained in the Act of incorporation. If no power of repeal is reserved, none can be exercised; but, when the charter itself or a general statute provides that the charter is subject to repeal by the Legislature,

at its pleasure, without restrictions or conditions limiting the power of repeal, the Legislature has the right to exercise its power summarily, and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by Courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and, in such case, a repeal, like other legislative acts which do thus palpably violate the principles of natural justice, may be reviewed by Courts. The power of the Legislature, therefore, is not unlimited, for the private rights of persons are not subject to an unjust and despotic exercise of power by a Legislature, without means of redress. "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers." (*Loan Association v. Topeka*, 20 Wall., 663.) It is always to be presumed that the Legislature has exercised its great powers for adequate cause, and the extreme caution with which Legislatures ordinarily act upon the subject of the repeal of charters fully warrants such a presumption.

It is to be observed, that this charter, like the majority of Connecticut charters, provides that it may be repealed "at the pleasure of the General Assembly." It is unlike the charters in the Pennsylvania cases of *Erie & N. E. Railroad Company v. Casey*, (26 Penn. St., 287,) and *Commonwealth v. Pittsburgh & Connellsville R. R. Co.*, (58 Penn. St., 46,) which provided, that, if the companies should abuse or misuse their franchises the charter should be subject to repeal. There is no question here, whether the Legislature is or is not the final judge whether the contingency upon which the authority to repeal is based has occurred. The language of this charter is also unlike the charter which was examined in *Allen v. McKean*, (1 Sumner, 276,) which provided that the Legislature could alter, limit, restrain or annul the powers conferred, and in which case the Court held that a right of absolute repeal was not reserved. The right of repeal is here

expressly reserved, is to be exercised at the pleasure of the General Assembly, and is subject only to the limitation which I have suggested.

It is not material whether the Court of Probate had or had not decided that it was not expedient to appoint a trustee. That Court simply found that the company was insolvent, but that its assets were not less than three-fourths of its liabilities. The finding or the opinion of the Court did not debar the Legislature from taking such legislative action as it deemed just.

A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the Legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from, or divided unfairly and unequally among, the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights. "The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a Court of equity will lay hold of the fund and see that it be duly collected and applied.

\* \* \* A law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the State, would as clearly impair the obligation of its contracts, as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts." (*Curran v. State of Arkansas*, 15 How., 312.) The Legislature has also the right, as an administrative measure, to appoint a trustee, to take the assets and manage the affairs of a corporation whose charter has been repealed, in conformity with the general, just rules which it has prescribed, or with the rules of a Court of equity, if no statutory provisions have been enacted. If no trustee is appointed by the Legislature, "a Court of equity,

which never allows a trust to fail for the want of a trustee, would see to the execution of that trust, although, by the dissolution of the corporation, the legal title to its property had been changed." (*Curran v. Arkansas*, cited *supra*.) The complainants do not controvert, in the main, the principles which have been stated, but they contend, that, while the Legislature had the right to repeal this charter, it has not been in fact repealed; and, if it has been repealed, that the provisions by which the commissioner was appointed to hold the assets subject to the order of the Chief Judge, who does not act as a judge, but merely as a committee, and whose directions are not subject to appeal or review, and the provision that the title to the assets shall be vested in the commissioner, are invalid, and that the resolution is void.

(1.) It is contended that the preamble is void, because the Legislature has no power to find facts which may affect private rights, and that the preamble is so interwoven with the resolution, that, being void, the resolution is void also. It is true, that the facts recited in a preamble of a private statute are not evidence, as between the person for whose benefit the Act was passed and a third person, and that a Legislature has no power to find facts by legislative enactment, so as to be evidence in suits against persons who were not applicants for the Act. (*Elmendorf v. Carmichael*, 4 *Littell*, 472; *Parmelee v. Thompson*, 7 *Hill*, 80.) This is an obvious rule of evidence, but it has no application here. If, as is admitted, the Legislature had the power to repeal the charter, it had the power to state the reasons which induced it to act. A statement of the reasons was not indispensable to the validity of the repeal, but was proper for the information of the public and of the corporation. This resolution is not a judicial act, finding that a forfeiture of the charter has taken place. If it was, it could well be urged, that a Legislature has not ordinarily judicial powers, and that the attempt to exercise judicial functions is void; but, the resolution is a legislative act, declaring the repeal and not the forfeiture of the charter, and the recitals are not in the nature of judicial

findings of facts, but the statement of the reasons which operated upon the legislative mind. "The inquiry into the affairs or defaults of a corporation, with a view to continue or discontinue it, is not a judicial act. No issue is formed. No decree or judgment is passed. No forfeiture is adjudged. No fine or punishment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertain facts upon which to exert legislative power, or to learn whether a contingency has happened upon which legislative action is required." (*Crease v. Babcock*, 23 *Pick.*, 344.)

(2.) The complainants insist, that the Legislature must of itself determine whether an enactment shall or shall not be a law, and cannot delegate the power to make or repeal laws; and that the attempted repeal of this charter is delegated to the insurance commissioner, and is, therefore, void. The resolution provides, that the charter shall be repealed on September 1st, 1875, provided, if the company shall, before that day, receive a certificate that the deficiency in its assets has been supplied, then the charter shall remain in full force; and, in case of a disagreement between the commissioner and the company as to the amount of its assets, the Chief Justice and his associate shall determine and state the amount to be paid in, and, if the amount so found shall be paid within thirty days, the resolution shall be inoperative and void. I am inclined to the opinion, that, by this resolution, the charter was repealed, but the repeal was not to take effect, or be operative, if a specified event should thereafter take place, which event was uncertain. The commissioner, subject to an appeal to the Chief Justice and a judge of the Superior Court, was to determine whether that event had taken place. The Legislature, for itself, determined and enacted that the charter should be repealed, provided an event did not occur in the future. The ascertainment and announcement that the event had happened, the Legislature entrusted to an officer, or a committee, whom it designated. The Legislature delegated to no one the power to determine whether the

charter should or should not be repealed. It delegated the duty of ascertaining whether a fact existed, upon the existence of which it had determined that the repeal should not go into effect. "A valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. It is a law *in præsenti*, to take effect *in futuro*. The event or change of circumstances must be such as, in the judgment of the Legislature, affects the question of the expediency of the law. The Legislature, in effect, declare the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to nobody to judge of its expediency." (*Barto v. Himrod*, 8 N. Y., 483, per RUGGLES, Ch. J.)

(3.) The complainants further say, that the charter is not repealed until after the decision of Judge Park and his associate; that the Legislature has no power, either before or after the repeal, to take the assets of an insurance company out of the hands of its officers, and to transfer the custody of the property to a third person, who is to hold them subject to the order of an individual acting not as a judge, and exercising no judicial functions, and not necessarily guided by the principles of law, and from whose order there is no appeal; and that the resolve is a special and personal statute, prescribing an exceptional and peculiar rule of conduct upon this single corporation, and, therefore, unjust, and in violation of legislative powers. The original resolution which was reported to the Legislature contained the first proviso only. As reported, it manifestly provided that the charter should be repealed on September 1st, 1875, unless, upon the happening of a certain event, the repeal should not go into effect. An amendment was added, by which, in case of disagreement between the commissioner and the insurance company, another committee was appointed, to ascertain the amount of deficiency, if any, and, if the amount so ascertained should be paid in, the resolution should be inoperative *and void*. It is a question which it is not now necessary to determine, whether the charter is already repealed, or whether its repeal occurs at the expiration



of the time which is limited for payment of the deficiency, if any there be, which may be found by the two judges, and upon non-payment of the amount. I have already suggested that the true construction is, that the charter is repealed, to take effect or not to take effect, upon the happening of an uncertain event. If the charter is repealed, there can be no doubt of the power of a Legislature to appoint some person to act merely as custodian of the assets of the corporation. But, assuming that the charter is now in existence and unrepealed, I am of the opinion that the Legislature has the power, if in their opinion the public interests and the rights of the creditors of a particular corporation demand it, to take away the custody of the assets of such corporation from its directors, and entrust the custody to an officer of the State, pending an investigation into the company's solvency, and the determination of the fact whether the event has happened upon which a repeal of the charter will take place. It is apparent, from an inspection of the resolution, that the Legislature deemed the corporation insolvent, and that the liabilities exceeded the assets \$400,000, and also was of opinion that the corporation had not complied with the requirements of law, and that the affairs of the company were in so precarious a position that it was proper to take the unusual step of repealing the charter. But, the Legislature was also willing to give the company an opportunity of making good the deficiency, and further was willing not to permit the decision of the insurance commissioner upon the question whether the deficiency had been supplied, to be final, but to entrust the final hearing and determination in regard to the sufficiency of assets to two persons whose judicial position peculiarly adapts them to pass upon disputed questions of fact, and whose official character precludes the suspicion that injustice might be done, and should assure the creditors that their rights are to be guarded. That investigation would necessarily consume time. The question presented itself—do the interests of the *cestuis que trust* in the property of the company require that, during the investigation, the assets, which, in our opinion, have become seriously

impaired, shall remain in the hands of the directors? The Legislature decided to place the assets, for the time being, in the custody of an officer of the State, and derived their power so to do from the general power which had been reserved over the affairs of this particular corporation—that of amendment of its charter at its pleasure. “Whatever might be true, if the charter was a close one, the General Assembly could impose upon the defendants any additional condition or burden connected with the grant, which they might deem necessary for the protection or welfare of the public, and which they might originally and with justice have imposed.” (*English v. N. H. and Northampton Co.*, 32 Conn., 243; *Commissioners, &c., v. Holyoke Water Power Co.*, 104 Mass., 446.) It is not necessary that the resolution should be styled an amendment. (*Bishop v. Brainard*, 28 Conn., 298.) The Legislature has reserved to itself the control of this charter, and can modify it to meet any exigency which may arise in the affairs of the corporation; and, when the Legislature has determined that the pecuniary interests of the creditors are so imperilled that the necessity of repealing the charter may arise, it would seem that the Legislature has the power to provide that the officer who has the oversight of all the insurance companies of the State is the proper person to have the exclusive custody of the assets of this corporation, and act as its treasurer for the time being. The Legislature could originally have imposed this condition upon the company. They can impose it at any time when they deem it necessary for the protection or welfare of the corporation.

It is, also, earnestly contended, that the resolution directs the commissioner to hold the assets subject to the order of a committee not acting judicially, and from whose order there is no appeal, and who, in his directions, is not necessarily acting in conformity with principles of law. It is true that the Chief Justice will act as committee or agent of the Legislature, and not strictly in his judicial capacity; and, if the resolution and the general statute in regard to life insurance corporations whose charters have been repealed, placed the assets

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*Lothrop v. Stedman.*

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under the control of a committee, to be disposed of as the committee pleased, and without the control of the Courts of the State, such Acts would properly be the subject of severe criticism, and might be declared to be inoperative. This resolution simply empowers the commissioner to hold the assets. He cannot sell or dispose of them under the resolution, but is merely their custodian. The Chief Justice has only authority to notify the commissioner either to return the assets to the company, or that the event has not taken place upon which the repeal of the charter is avoided, after which the commissioner is to be governed by the general statute. He then becomes a trustee under the exclusive direction and control of a Court of equity, and subject to its decrees. The assets are not to be managed or disposed of, and the avails are not to be paid, in accordance with the order of a committee, but in pursuance of the general statute and under the direction of the Superior Court—a Court of general jurisdiction and of full chancery powers. The weight of the complainants' argument bore upon this clause of the resolution, which they considered most unjust and prejudicial to their interests. I think that they misapprehend the nature of the powers of the Chief Judge over the assets, which is so limited that there is no interference with the rights of creditors.

Upon the argument of the motion, the provisions of the general statute were criticised by the complainants. The bill does not ask for the interference of the Court upon the ground of the invalidity of the statute, but the Court is asked to prevent the commissioner from taking possession of the assets under the authority of a resolution of the General Assembly which is alleged to be void. I do not deem it, therefore, incumbent upon me, at this time, to consider the character of the statute.

The suggestion which has been made in regard to the control of the Legislature over those charters in which a power of amendment or repeal has been reserved, applies to the objection that this resolution is a special and peculiar law by which the rights of this corporation are to be jeopardized, dif-

fering from the law applicable to all other corporations in like condition. All insurance companies in Connecticut are created by special charter. Each company is under the particular supervision of the Legislature, and is liable, in case of insolvency or malfeasance, to be controlled by such action applicable to the special case, as shall serve to protect creditors, or stockholders, or the public.

Sundry affidavits were read for the purpose of showing that Mr. Stedman had not informed the company, prior to September 1st, of the amount of the alleged deficiency, and had not given the company an opportunity to supply the required amount, and had not acted justly towards the company since the passage of this resolution. Counter affidavits were presented by the commissioner. If any steps were to be taken by the commissioner in advance of the action of the company, prior to September 1st—in regard to which I express no opinion—I am not satisfied that the commissioner failed to do whatever the resolution or the statutes, or the duty which he owed to the corporation or to the public, imposed upon him. The corporation does not seem to me to have suffered in consequence of a neglect of the commissioner to keep them informed of his views and wishes.

The motion for a provisional injunction is denied, and the restraining order now in force is vacated.

*William D. Shipman* and *William W. McFarland*, for the plaintiffs.

*Simeon E. Baldwin*, for the insurance commissioner.

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## THE MAGIC RUFFLE COMPANY

*vs.*

## THE ELM CITY COMPANY. IN EQUITY.

Letters patent granted to George B. Arnold, May 8th, 1860, for an "improvement in ruffles," and three other patents, were owned by the plaintiffs, a corporation of New York. They had recovered a verdict in a suit for an infringement of the Arnold patent. The defendants, a corporation of Connecticut, had been infringing that patent. On the 21st of February, 1863, an agreement of license was made between the two corporations, whereby the plaintiffs agreed to license the defendants, under the four patents, to manufacture and sell under such license, exclusively, the ruffle then manufactured and sold by the defendants, and known as "the double ruffle," and to use the patented machines in the manufacture only of the said double ruffle, and whereby, in consideration of said license, the defendants expressly recognized the validity of each of said patents, and agreed to receive licenses as aforesaid under each of them, and expressly agreed that they would manufacture and sell only the said double ruffle, and that the said double ruffle should not be divided by them, and whereby they agreed to submit, at all times, their manufactory to inspection, so that the plaintiffs should be advised of the kind of ruffles which were being manufactured, and to pay counsel in the suit above named, and to retain and pay counsel thereafter in suits relating to and in support of said patents, and to pay one-half of the other expenses of sustaining said patents, and whereby each party agreed to assist the other in suits which might be instituted by either for the purpose of maintaining its rights under either of said patents. The bill in this suit alleged, that, after the agreement of license was made, the defendants continued to make and sell the double ruffle of the kind referred to in the agreement, and also made and sold, in violation of the agreement and of the Arnold patent, quantities of single ruffles, each of which contained the invention described and claimed in said patent, and prayed for a disclosure by the defendants of their profits and of the number of yards of single ruffle containing said improvement which they had made and sold, and for the payment of such profits and of the damages sustained by the plaintiffs. The answer, besides denying the infringement, denied the novelty of the invention covered by the Arnold patent, and alleged that the defendants had, ever since the agreement was executed, been engaged, to the knowledge of the plaintiffs, in the sale of ruffles which were not claimed by them, until about the time of the commencement of this suit, to violate said patent, and that this suit was brought on a stale claim, and one unfounded in equity: *Held*, that the defendants were

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estopped, by their covenants in the agreement, from denying the validity of the patent.

The contract was not merely an agreement for a license, but was an executed license.

The plaintiffs could sue for either an infringement of the patent or a breach of the agreement, and the bill in this case could be regarded as a bill in either aspect.

As a bill founded on the agreement, although no royalties were payable, and although the patent had expired, the bill is not open to the objection that there is a complete and adequate remedy at law, because an account and a discovery are necessary to ascertain the facts from which the damages to the plaintiffs can be computed, and this bill is a bill for an account and a discovery.

The contract having become executed, and the defendants having enjoyed its benefits, they cannot, in the absence of fraud on the part of the plaintiffs, deny the truth of their admission of the validity of the patent.

The invention in the Arnold patent consists in confining the tucks or gathers in place and securing them to a binding or ungathered piece of cloth, by one and the same series of stitches, or, in other words, causing one series of stitches to perform the double duty of confining the plaits and attaching them to the binding or other material. The claim, namely, the ruffle "as a new article of manufacture, the gathered cloth A (the ruffled strip) being secured to the binding B (the band) by the single series of stitches C, which perform the double duty of confining the gathers and of securing the gathered cloth to the binding, substantially as herein set forth," is infringed by the defendants' ruffle, which is a plaited strip combined with a band, a single row of stitches performing the office of securing the gathers and uniting the gathered cloth to the band, although it has, in addition, a second row of stitches in the band, not securing the band to the gathered cloth, and although it is a finished article, having a band with an even and finished edge, and is designed to be worn as a neck ruffle.

The defendants' ruffle is not a double ruffle, and so within the license, because, if it is divided between the two rows of stitches, one part will be a ruffle, and the other will be a useless strip of stitched cloth, not a ruffle, in any proper sense of the word.

The defence, that the agreement in regard to the manufacture of ruffles other than the double ruffle was subsequently abandoned by the plaintiffs, is not sustained.

Nor is the defence sustained, that the claim has become stale, by reason of the laches of the plaintiffs in vindicating their rights, and in acquiescing in the assertion of adverse rights by the defendants.

(Before SHIPMAN, J., Connecticut, October 20th, 1875.)

SHIPMAN, J. The parties in this case are corporations. The complainants were created under the laws of the State of

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New York, and the defendants were incorporated under the laws of the State of Connecticut, and are established at New Haven, in this District. The bill alleges, that the complainants are and have been since September 18th, 1860, the owners of letters patent number 28,244, granted to George B. Arnold, on May 8th, 1860, for a new and useful "improvement in ruffles," and were also, in the month of February, 1863, the owners of three other patents, theretofore issued to George B. Arnold and Alfred Arnold, for other improvements in machinery for making ruffles, and in ruffles, which improvements were generally known as the "Double Feed," "Separator," and "Ruffle without a band;" that, prior to the month of February, 1863, upon a suit of the complainants against Douglas and Sherwood, in the Circuit Court of the United States for the Southern District of New York, a verdict was rendered by which patent number 28,244 was sustained; that the defendants had at that time been engaged in manufacturing and selling ruffles containing the improvement described in said letters patent; and that, in order to avoid further litigation, and for peace sake, and for the purpose of harmonizing the business conducted by the two corporations, an agreement, dated February 21st, 1863, was entered into, and was thereafter an executed agreement of license, and no legal proceedings against the defendants were commenced. The material portions of this agreement are as follows: "The Magic Ruffle Company hereby agree to license the said Elm City Company under the four several patents granted to George B. Arnold, and George B. and Alfred Arnold, to wit, the Double Feed, the Separator and its combinations, the Ruffle with a band, and the Ruffle without a band, to manufacture and sell under said license, exclusively, the ruffle now manufactured and sold by the said Elm City Company, at their manufactory in New Haven, Connecticut, and known as the double ruffle, and to use the machines patented to the said George B. Arnold, and George B. and Alfred Arnold, in the manufacture only of the said double ruffle. In consideration of the said license, the said Elm City Company do hereby expressly recognize the

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validity of each of said patents, and hereby agree to receive licenses as aforesaid under each of them, and hereby expressly agree that they will manufacture and sell only the said double ruffle, and that the said double ruffle shall not be divided by the said party of the second part." The Elm City Company also agreed to submit, at all times, their manufactory to inspection, so that the Magic Ruffle Company should be advised of the kind of ruffles which were being manufactured, and to pay counsel in the suit of Douglas and Sherwood, and to retain and pay counsel thereafter in suits relating to and in support of said patents, and to pay one-half of the other expenses of sustaining said patents. It was mutually agreed, that each party was to assist the other in suits which might be instituted by either party for the purpose of maintaining its rights under either of said patents. The bill also alleges, that, thereafter, the defendants continued to manufacture and sell the double ruffle of the kind referred to in the agreement, and that, after February 21st, 1863, they made and sold, in violation of said agreement and of said letters patent, many thousand yards of single ruffles, each of which contained the invention described and claimed in the said letters patent, and prays that the defendants may be required to make a disclosure of all their gains and profits, and of the precise number of yards of single ruffle containing the said improvement, which they have made and sold, and to account for and pay over such gains and profits as have arisen to them, and also all damages which the complainants have sustained by reason of the premises.

The answer denies that the defendants have made and sold any ruffles in violation of letters patent No. 28,244, alleges that the ruffles which they have made were made by the aid of machinery which was invented by and patented unto Crosby and Kellogg, and that, at and prior to said agreement, they were manufacturing, by the use of said machinery, as they lawfully might, double ruffles of a peculiar kind, which were afterwards divided so as to form single ruffles of a form and arrangement some of which somewhat resembled



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the ruffles manufactured by the complainants, and, to avoid any possible controversy with said complainants, the said defendants agreed not so to manufacture single ruffles thereafter, but that said agreement was intended only to prevent the manufacture of that particular kind of single ruffle; and that the defendants have not, since the date of said agreement, made or sold a gathered ruffle having a single series of stitches, which is the only kind of ruffle claimed in patent No. 28,244. The answer denies the novelty of the alleged improvement described in said patent, and alleges that the defendants have, ever since the execution of said agreement, been engaged, to the knowledge of the complainants, in the sale of ruffles which were not claimed by them, until about the time of the commencement of this suit, to be in violation of said patent, and that this action is brought upon a stale claim, and one which is unfounded in equity.

(1.) The first question in this case is—are the defendants estopped, by their covenants in the agreement, from denying the validity of the complainants' patent? The defendants contend, that the suit is against them simply as infringers, for a violation of the complainants' patent rights, and that the covenant which is claimed to be an estoppel, being contained in an instrument collateral to the patent, cannot operate as an estoppel in a suit which is not founded upon the agreement but upon the patent, and that no bill in equity can be sustained upon the agreement, inasmuch as for a breach of that contract the complainants have a full and adequate remedy at law.

The contract is not merely an agreement for a license, but is an executed license. Such was the intention of the parties, as it is to be collected from the whole of the instrument. (*Buell v. Cook*, 4 Conn., 242.) By the agreement, the defendants were licensed to manufacture and sell the double ruffle only. If they manufactured and sold any other ruffle which was protected by either of the patents, they became, as to such ruffle so improperly manufactured, infringers, and the complainants could resort to an action at law or in equity, to

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obtain redress for this violation of their exclusive patent rights. If the licensee "uses the patented invention beyond the limits of the license or grant, or in a way not authorized by the license or grant, then there has been a violation of a right secured to the patentee under a law of the United States giving to him the exclusive right to use the thing patented, although such licensee performs, according to their terms, all the covenants entered into by him," (*Goodyear v. Union India Rubber Co.*, 4 *Blatchf. C. C. R.*, 65; *Wood v. Wells*, 6 *Fisher's Patent Cases*, 382;) and, if the licensees have also expressly covenanted, in their agreement of license, that they will do or will not do a particular act, or will not use the invention for a particular purpose, a violation of such covenant is also a breach of contract, not arising under the laws of the United States, but for which remedy may be sought in the Circuit Courts of the United States, provided the citizenship of the parties gives jurisdiction to such Court. (*Goodyear v. Union India Rubber Co.*, cited *supra*; *Goodyear v. Congress Rubber Co.*, 3 *Blatchf., C. C. R.*, 455; *Wilson v. Sandford*, 10 *How.*, 99.) In this case, it was competent for the complainants to take either one of the two remedies for the alleged injury, which have been mentioned. They could bring a bill alleging an injury to their exclusive rights under the laws of the United States, or, as the residence of the parties gave this Court jurisdiction, could bring a proper suit, setting up the breach of the contract as the *gravamen* of their action. The averments of their bill are sufficient to justify a Court in holding, if necessary, that it is a bill for an injury to their patent rights, but, it is manifest, from an examination of the stating part of the bill, that the pleader intended to make the alleged breach of the agreement the foundation of the action, and that he is seeking to recover damages for an injury to the complainants arising out of the violation of the contract.

But the defendants insist that a bill in equity, based upon the contract cannot be sustained, because, for a breach of the contract, there is a complete and adequate remedy at law. There is, undoubtedly, a remedy at law for the alleged injury.

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The only question is, whether it is complete and adequate. If the complainants were seeking to recover royalties which the defendants had agreed to pay, inasmuch as the account is particularly within the knowledge of the defendants, or, if the patent was still in existence, and the preventive remedy by injunction against future injuries could be administered, there would be no question that a bill in equity would be a proper remedy. (*Eureka Co. v. Bailey Co.*, 11 Wall., 488; *Good-year v. Congress Rubber Co.*, 3 Blatchf. C. C. R., 449; *Rich v. Hotchkiss*, 16 Conn., 409.) In this case, the defendants had not agreed to pay royalties, and an injunction cannot be granted, inasmuch as the patent has expired. It is alleged that the defendants have violated the contract of license by manufacturing and selling a ruffle which they were not authorized to make, and which they had agreed not to make. By this violation the complainants say that they have been injured, and the redress which they ultimately seek is the payment of damages. Although the suit is upon the contract, the damage to the complainants, if any, is the damage which they have sustained from the injury to their patent rights. The ascertainment of the facts from which such damages can be estimated, is, in cases of injury to property in letters patent, peculiarly within the province of a Court of equity, because, the facts from which damages are to be computed can only be ascertained by an account and a discovery of the number and amount of articles which have been sold by the defendants—facts which are exclusively within their knowledge. They alone have the evidence which can enable the complainants to recover, either at law or in equity. It is true, that damages are not ordinarily assessed by a Court of equity, (*Livingston v. Woodworth*, 15 How., 546); and, prior to the Act of 1870, authorizing the Circuit Court, as a Court of equity, to decree the payment of damages in patent cases, damages were not recoverable in equity suits. A bill in equity proceeded, prior to that Act, upon the theory that the infringer was equitably bound, as a trustee, to pay to the patentee the profits which had been made by an unlawful use of the inven-

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tion. (*Cowing v. Rumsey*, 8 *Blatchf. C. C. R.*, 38.) But, this bill is a bill for an account and a discovery. It avers that the complainants do not know, and cannot set forth, the number of yards of ruffle which have been made in violation of the patent and of the agreement, and prays for a disclosure of the quantity which has been made and sold. Whether, having obtained jurisdiction of the case, the Court will proceed to grant further and complete relief, and to exercise a power which Courts of equity have, in certain cases, heretofore exercised, (*Russell v. Clark's Ex'rs*, 7 *Cranch*, 69; *Pratt v. Law*, 9 *Cranch*, 456; *Insurance Co. v. Colt*, 20 *Wall.*, 560), and what relief will be granted, are questions which can be determined more properly after the report of the master shall have been received.

It is well settled, that, where the suit is upon a license, or upon a contract, which license or contract contains covenants on the part of the defendants, by which they admit the validity of the plaintiffs' patent, and agree to maintain it by suits or legal proceedings, and there has been an enjoyment of the license by the defendants, they are estopped from denying the truth of their admissions, unless it shall be averred, by cross-bill, or answer, that such agreement was obtained by fraud, surprise, or imposition. (*Eureka Co. v. Bailey Co.*, 11 *Wall.*, 488; *Crossley v. Dickson*, 10 *House of Lords Cases*, 293.) It is evident, from an inspection of this agreement, and from the answer, that there had been litigation in regard to the validity of the patents, between the plaintiffs and Douglas and Sherwood, and that the parties to the agreement entered into it in order to avoid similar litigation between themselves, and to prevent future violation of the patents by others. "The agreement was manifestly intended to adjust conflicting rights," and it cannot be permitted, in the absence of fraud on the part of the plaintiffs, that the defendants should deny the truth of their careful and deliberate admissions, especially since the contract has become executed, and they have enjoyed its benefits.

(2.) Is the ruffle which has been manufactured and sold

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by the defendants, and which is styled the Princess ruffle, an infringement of patent No. 28,244? The specification of the patent states, that the nature of the invention "consists in confining the tucks or gathers in place, and securing them to a binding or ungathered piece of cloth, by one and the same series of stitches; or, in other words, causing one series of stitches to perform the double duty of confining the plaits and attaching them to the binding or other material." The claim is for the ruffle "as a new article of manufacture, the gathered cloth A, (the ruffled strip), being secured to the binding B, (the band), by the single series of stitches C, which perform the double duty of confining the gathers and of securing the gathered cloth to the binding, substantially as herein set forth." The article is a plaited or gathered piece of cloth, the gathers of which are confined in their place by a row of stitches, which, also, at the same time, secures the gathered cloth to a band, and this band is an unhemmed strip of cloth, which is to be attached by the purchaser to whatever garment the ruffle is to ornament. "The distinguishing features of this article, by which it is materially different from all ruffles known before," have been declared to be, in the case of *The Magic Ruffle Co. v. Douglas*, (2 *Fisher's Patent Cases*, 330), "the single series of stitches, and the unvarying regularity of the plaits or gathers, thus dispensing with the gathering thread, avoiding the injurious process of whipping or scratching the fabric with a sharp needle, and the perforations in the ruffled piece which the needle and thread make in gathering." The defendants' ruffle is a plaited strip, combined with a band, a single row of stitches performing the office of securing the gathers, and uniting the gathered cloth to the band, but it has, in addition, a second row of stitches in the band, not securing the band to the gathered cloth. The ruffle can be cut in two, between the two rows of stitches. One part would be a ruffle, and the other a strip of stitched cloth. The Magic ruffle of the plaintiffs is an unfinished article, to be attached by the band to ladies' or children's undergarments. The Princess ruffle is a

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finished article, having a band with an even and finished edge, and is designed to be worn as a neck ruffle. Still, the distinguishing characteristic of the Magic ruffle is found in the Princess ruffle, which contains the row of stitches performing the double office of confining the gathers and attaching the ruffled cloth to the band; and, although the Princess ruffle has a second series of stitches, and is a completed article, different in appearance, and used for a different purpose, from the Magic ruffle, yet, in its patentable characteristics, it contains the single feature which had been previously patented by the plaintiffs' grantor. It has other and additional features which render it a different article from the Magic ruffle in the eye of the trade and of the purchaser, but these additional features do not vary the one peculiarity in which it resembles the Magic ruffle. If that peculiarity is a patentable one, it follows that the defendants' ruffle is an infringement of the plaintiffs' patent.

An attempt was made to claim that the Princess ruffle was a double ruffle, and so within the license to the defendants, but it is obvious that, if the Princess ruffle is divided, the narrow strip which remains after the ruffle proper has been cut off, is a useless strip of stitched cloth, and is not, in any proper sense of the word, a ruffle.

The answer further alleges, that, after the execution of the agreement, the defendants discovered the existence of letters patent to Isaac M. Singer, dated on or about March 18th, 1856, and that the complainants, believing that this invention substantially contained that described in patent 28,244, desired to join with the defendant in purchasing the same; that it was purchased by both parties about April 2d, 1863, and, since that time, the complainants have made no attempt to enforce their patent, but have regarded the same as substantially inoperative and worthless; and that, by reason of said Singer patent, the patent numbered 28,244 is void. Whether the Singer patent does or does not anticipate the patent of the complainants is not material, inasmuch as the validity of the latter patent is not here in issue. This part of the answer is

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material only upon the question of the laches of the complainants in the vindication of their alleged rights. The only evidence in regard to the reasons for the purchase of Mr. Singer's patent, or the opinions of the complainants in regard to the effect of the Singer invention upon the validity of their own patent, is contained in the testimony of the defendants' treasurer, who says, that "the defendants discovered the existence of the Singer patent, and, thinking that, if left in the hands of other parties, it might possibly be used for purposes of litigation and annoyance, causing expense and trouble, they thought best to secure it, and the Magic Ruffle Company, regarding it in anticipation of their patent, wished to unite with us in securing it, and, as that would save one-half of the expense, and, as we thought, answer our purpose, we consented to do so, and it was bought jointly by them and the defendants." This does not maintain the position of the defendants, that the agreement in regard to the manufacture of ruffles other than the double ruffle was substantially abandoned in consequence of the purchase of the Singer patent. This purchase seems to have had no material influence upon the relations of the parties, or upon this agreement.

The most important point of the defendants is, that they have been manufacturing the Princess ruffle ever since the date of the agreement, with the knowledge and acquiescence of the complainants, and were not notified that such manufacture and sale were regarded by the complainants as a violation of the agreement, or of the patent, until after it had expired, and about the time of the commencement of this suit, and that this claim, if it ever had any validity, had become stale, and should not be favored by Courts of equity, by reason of the laches of the complainants in the vindication of their rights, and their acquiescence in the assertion of adverse rights. If I was satisfied, from the evidence, that the defendants had manufactured and sold the Princess ruffle since 1862, in such quantities that the attention of the plaintiffs must have been early called to the infringement, or that they actually knew of the violation of the agreement ever since the

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*The Magic Ruffle Company v. The Elm City Company.*

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year 1862, I should be of opinion that their delay in making known their claims was such as to prevent them from now receiving the aid of a Court of equity to the extent of its powers. The testimony of the treasurer of the defendant corporation upon this part of the case is guarded, as will be seen by the following quotation: "Question. Subsequent to the date of that agreement, and up to the time of the commencement of this suit, have the defendants manufactured and sold ruffles like Exhibit Barney, No. 3? Answer. Yes; more or less. Question. Has the same been sold in New York. If so, name a few of the houses to whom it has been sold? Answer. Yes; Calhoun & Robbins, J. B. Spelman & Son, L. H. Mandelbaum & Co., and a number of others, whom I could not positively swear to know by name. Question. It has been in the market to a considerable extent, has it not, and under what name? Answer. It has, under the name of Princess." The testimony in the case, as it now stands, does not show that the Princess ruffle has been in the market to any large extent, and that the complainants must necessarily have known that the defendants were manufacturing and selling this ruffle, and thus show that the complainants were negligent in the enforcement of their rights, or were willfully permitting the defendants to continue the manufacture, under the supposition that their conduct was not open to criticism.

As I have said, I am not now called upon to decide as to the measure of damages. The only decree which can now be made is, to order an accounting and a disclosure, and a reference to a master to ascertain the number of yards of Princess ruffle which have been manufactured and sold, and the amount of such sales during each year, and to ascertain the profits which have accrued to the defendants from such manufacture, for the purpose of ascertaining the amount of the complainants' damages. Other questions in regard to damages will be determined upon the hearing after the accounting shall have taken place.



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Banks v. McDivitt.

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Let a decree be entered for a reference and an account.

*Clarence A. Seward* and *William D. Shipman*, for the plaintiffs.

*Charles R. Ingersoll* and *Edwin W. Stoughton*, for the defendants.

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DAVID BANKS AND OTHERS

vs.

## JOHN R. MCDIVITT AND OTHERS. IN EQUITY.

B. took a copyright, in 1871, for the "Rules of Practice of the Supreme Court of the State of New York," and one in 1874 for the "General Rules of Practice of the Courts of record of the State of New York." The book of 1871 contained the Rules adopted by the judges under the authority of a State statute, in 1870, with notes to each Rule, stating the substance of the decisions of the Courts in regard to such Rule, giving the volumes and pages of the reports. The book of 1874 contained like Rules adopted in 1874, with like notes. By law, the judges were required to revise the Rules every two years. M. published in 1875 a book containing the Rules adopted in 1874, with notes to each Rule, referring only to the volume and page of the reports of decisions in regard to such Rule. M., in compiling his book, copied the citations in B.'s book of 1874, and supplemented them by citations from B.'s book of 1871, and by results of his own research. In a large majority of the notes in M.'s book, the citations were the same, and placed in the same order, as in B.'s book of 1874: *Held*, that M. had infringed B.'s copyright of 1874.

Compilers of books which contain facts derived from common sources of information, must investigate for themselves from the original sources which are open to all persons, and cannot use the labors of a previous compiler, *animo furandi*, and the subsequent compiler cannot save his own time by copying the results of the previous compiler's study, although the same results could have been obtained by independent labor.

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*Banks v. McDivitt.*

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The publication by B. of the Rules of 1874, with appropriate notes, was not the publication of a new edition of the Rules of 1871, within the statute requiring certain words in regard to the copyright to be inserted in the several copies of every edition of a copyrighted book.

Where an infringement is palpable, and a provisional injunction will not be attended with serious injury, such injunction is not ordinarily refused as to so much of the work as is a plain infringement of the prior publication.

(Before SHIPMAN, J., Southern District of New York, October 29th, 1876.)

SHIPMAN, J. The plaintiffs are the proprietors of a book which was published in 1871, entitled, "Rules of Practice of the Supreme Court of the State of New York," &c., and are also proprietors of a book which was published in the year 1874, entitled, "General Rules of Practice of the Courts of record of the State of New York." All the requirements of the statutes of the United States in regard to copyright have been complied with by the plaintiffs in respect to each of these books. The book which was published in 1871 contains the rules of practice which were adopted in general session of the justices and judges of the State of New York, on December 20th and 21st, 1870, with notes appended to each rule. The notes briefly state the substance of the decisions which had been made by the Courts of New York in reference to the rules to which the notes are respectively appended, give the number and page of the volume in which the decision is to be found, and in like manner refer to the volume and page of the statutes which relate to the rule. A convention of justices and judges is required to be held biennially, to revise, alter, abolish and make rules which shall be binding upon Courts of record in the State. The book which was published in 1874 contains the rules of practice which were adopted in the convention of the justices and judges on November 24th, 1874, and which took effect on February 1st, 1875, and also contains notes and references upon the plan of the book of 1871, but upon a much larger scale, the book of 1871 having seventy pages, while the book of 1874 is of one hundred and twenty pages. The plaintiffs published a similar volume in 1858.

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*Banks v. McDivitt.*

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In the year 1875, the defendants published a book entitled, "New Rules of the Courts, General and Special, 1875," &c. This volume contains the rules which had been adopted by the judges on November 24th, 1874, with notes appended to each rule, which notes refer only to the volume and page of the various statutes and reports of decisions which relate to the rule. The book also has an index of the General Rules, and contains the special rules of the Supreme and other Courts of the State.

The plaintiffs brought, in February, 1875, a bill in equity, alleging that the introduction, the notes, and the index of the defendants' book were copied from the plaintiffs' book of 1874, in violation of the rights secured to them by the Acts of the United States respecting copyright, and praying for an injunction, and also filed a motion for a provisional injunction. This motion has been heard, and is the only part of the case which is now to be decided. The plaintiffs do not claim that they have acquired any title to the rules, which are admitted to be common property, neither do they assert that there is anything novel in the plan, or system, or arrangement of their compilation, or of their index. The notes are mainly a digest of the decisions of the Courts of New York and of the statutes of the State. The volumes which contain the decisions and the statutes are sources of information which are common and open to all, and to which each compiler can resort. But the plaintiffs complain that the defendants have not availed themselves of the original sources of information, but have resorted to the labor-saving expedient of copying the citations which the research of the plaintiffs had discovered, and that such a use of the labors of an author or compiler is an unauthorized violation of the rights which are secured by the Acts of Congress.

The rights and duties of compilers of books which are not original in their character, but are compilations of facts from common and universal sources of information, of which books, directories, maps, guide books, road books, statistical tables and digests are the most familiar examples, are well settled.

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No compiler of such a book has a monopoly of the subject of which the book treats. Any other person is permitted to enter that department of literature and make a similar book. But, the subsequent investigator must investigate for himself, from the original sources which are open to all. He cannot use the labors of a previous compiler, *animo furandi*, and save his own time by copying the results of the previous compiler's study, although the same results could have been attained by independent labor. The compiler of a digest, a road book, a directory, or a map can search and survey for himself in the fields which all laborers are permitted to occupy, but cannot adopt as his own the products of another's toil. "He may work on the same original materials, but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another." (2 *Story's Eq. Jur.*, § 940.) The rights of compilers of this class of works have been recently carefully considered by Sir W. Page Wood, Vice-Chancellor, in the cases of *Jarrold v. Houlston*, (3 *Kay & J.*, 708,) *Kelly v. Morris*, (*Law Rep.*, 1 *Eq. Cases*, 697,) and *Scott v. Stanford*, (*Law Rep.*, 3 *Eq. Cases*, 718,) and the rule which I have stated has been reaffirmed. In the case of *Kelly v. Morris*, the learned Vice-Chancellor says: "In the case of a dictionary, map, guide book, or directory, when there are certain common objects of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done." The rule is recognized or stated in *Hogg v. Kirby*, (8 *Ves.*, 215;) *Matthewson v. Stockdale*, (12 *Ves.*, 270;) *Longman v. Winchester*, (16 *Ves.*, 269;) *Wilkins v. Aikin*, (17 *Ves.*, 422;) *Lewis v. Fullarton*, (2 *Beav.*, 6;) *Hotten v. Arthur*, (1 *Hemming & Miller*, 603;) *Gray v. Russell*, (1 *Story*, 11;) *Folsom v. Marsh*, (2 *Story*, 100;) *Emerson v. Davies*, (3 *Story*, 768;) and *Curtis on Copyright*, 174 to 177. I do not understand that the rule prohibits an examination of previous works by the compiler before he has finished his own book, or the mere obtaining of ideas from such previous works, but

it does prohibit a use of any part of the previous book, *animo furandi*, "with an intention to take for the purpose of saving himself labor." (*Jarrold v. Houlston*, 3 Kay & J., 708.)

A careful inspection of the plaintiffs' books of 1858, 1871, and 1874, and of the defendants' book, and of Lansing's Code and Rules, published by the plaintiffs, to which my attention has been directed by the defendants' counsel, has led me to the conviction, that the general course which was adopted by the compiler of the defendants' book, was to copy the citations in the plaintiffs' book of 1874, and, if necessary, to supplement them with other citations in the book of 1871, and with references which his own research had discovered; but his chief original source of information was the plaintiffs' book of 1874. The conclusion that he copied these citations, in the first instance, from the plaintiffs' compilation, is derived from the fact, that, in a large majority of the notes, the citations are not only the same which are given in the plaintiffs' book of 1874, but are placed in precisely the same order in which they were arranged by the plaintiffs. This peculiarity is manifested throughout the defendants' book. It is noticeable in the notes which are appended to nearly all of the ninety-seven Rules, other than those which follow Rules 20, 22, 33, 35, 37, 43, 45, 47, 51, 53, 56, 58, 61, 63, 66, 68, 69, 71, 72, 77, 78, 82, 85, 86, 87, 88, 92, 93, 94, 96, and 97. Thus, the citations under Rule 7 are, "Rule 7, of 1871, amended; 2 How., 154; 1 Code R., 119; 3 How., 276; 1 Code R., 42; 5 Paige, 83; 4 do., 140." The citations under Rule 8 are, "Rule 5, of 1858, amended; Rule 8, of 1871, amended; Code, sects. 193 to 197; 4 Bosw., 632; 1 Wend., 35; 2 East, 181; 1 H. Blk., 76; note at 7 Abb., 73; 15 John., 535; 20 John., 129; 1 Chitt., 713; 2 W. Blk., 799; 2 Strange, 889." These citations are the same as those which are contained in the plaintiffs' book, and are placed in the same order in each compilation. There are, in the defendants' book, under the 18th Rule, sixty-two citations of decisions, all but one of which are the same, and are in the same order, as those which are contained in the plaintiffs' book of 1874.

It is impossible to suppose that the defendants could, by accident, have placed their references in the exact order in which they are found in the plaintiffs' book. The inference is irresistible, that the plaintiffs' book was first resorted to for the purpose of saving the time and labor which must otherwise have been spent in an original examination of the reports. I presume that the defendants' compiler subsequently examined the reports, in order to verify the accuracy of the citations, and to conceal the errors which he may have found, and that he did correct errors; and it is apparent, that, in many instances, he added citations which his own investigations discovered; but, it is manifest, that he was, to a large extent, in the first instance, a copyist of the labor of the plaintiffs. He states, indeed, in his affidavit, that his notes and references were principally taken from the plaintiffs' books of 1858 and of 1871, and from Lansing's Code and Rules, published by the plaintiffs in 1872, but thinks that he did not draw materially from the plaintiffs' book of 1874.

The defendants' index, of ten pages, is almost a reprint of the plaintiffs' index, except that the former refers to the rule, instead of the page. This fact is not denied in the affidavit of the defendants' compiler, and an examination shows that his index was almost exclusively made with the scissors, and not with the pen. Three sentences of the plaintiffs' introduction are also substantially found in the corresponding portion of the defendants' book; but I do not deem this resemblance to be important.

It follows, that the principle of law which I have stated has been violated, and that the plaintiffs are entitled to relief, unless they are debarred from any remedy by some other principle which may be invoked by the defendants. They insist, in this part of the case, that the provisions of the copyright Act, which are now contained in section 4962 of the Revised Statutes of 1874, have not been regarded by the plaintiffs. This section provides, that no person shall maintain an action for the infringement of his copyright, unless

he shall give notice thereof, by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it be a book, \* \* \* \* the following words, "Entered according to Act of Congress, in the year           , by A. B., in the office of the Librarian of Congress, at Washington." The proper page of the book of 1874 contained the entry, "Entered, &c., in the year 1874," but did not also contain the announcement that a previous edition had been entered in the year 1871; and it is contended, that, inasmuch as the book called "Rules of 1874" is another edition of the "Rules of 1871," the non-entry in the book of 1874 of the fact that the book of 1871 was entered, has destroyed the right to any action for an infringement. It is not necessary to consider the consequence of a non-compliance with this section in each edition of a book, for, I am of the opinion that a publication of the Rules of 1874, with appropriate notes, is not a subsequent edition of the Rules of 1871. The statute of New York provides that a convention of justices and chief judges shall be held at the Capitol in the city of Albany, on the first Wednesday of August, 1870, and every two years thereafter, and such convention shall revise, alter, abolish, and make Rules, which shall be binding upon all Courts of record, so far as they may be applicable to the practice thereof. The Rules of 1874 were adopted in pursuance of this statute, on November 24th, 1874, and were ordered to commence and take effect on February 1st, 1875, and were a new and revised set of Rules. New Rules had been added and old Rules had been amended. They were virtually new Rules of the Courts, which were to take effect on an appointed day, and the publication of the plaintiffs was in no proper sense a new edition of the Rules of 1871.

It is also suggested that the plaintiffs are not entitled to protection, because they are also infringers of previous publications of like character. I have not been referred to any book which they have infringed, except the Rules of Practice published by W. C. Little & Co., in 1858, and, from my

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examination of this book, I cannot perceive that the plaintiffs have made any unjustifiable use of it.

Where an infringement is palpable, and a provisional injunction will not be attended with serious injury, it is not ordinarily refused, as to so much of the work as is a plain infringement of the prior publication. Let a provisional injunction issue restraining the defendants from the sale of any volumes or books which contain the notes which are appended to the "New or Revised Rules of 1875," other than the notes to Rules 20, 22, 33, 35, 37, 43, 45, 47, 51, 53, 56, 58, 61, 63, 66, 68, 69, 71, 72, 77, 78, 82, 85, 86, 87, 88, 92, 93, 94, 96, and 97, and which contain the index now printed in said book.

*Elbert E. Anderson*, for the plaintiffs.

*Reed & Drake*, for the defendants.

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DEXTER A. KNOWLTON

*vs.*

THE CONGRESS AND EMPIRE SPRING COMPANY.

This action was brought in the Supreme Court of the State for Kings county, in 1869, and thereafter referred to a referee, before whom the plaintiff recovered a judgment, which was set aside by the Court of Appeals, in September, 1874. The remittitur from that Court was filed November 16th, 1874. Before that the referee had died. There were terms of the circuit in Kings county in October and November, 1874, and January, March, and April, 1875. The cause was removed into this Court on the petition of the plaintiff, filed in the State Court, April 24th, 1875, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470): *Held*,

- (1.) That this Court was the Circuit Court for "the proper District," within the meaning of § 2 of the Act of 1875, being the Circuit Court for the District



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within the territorial limits of which the suit was pending in the State Court;

- (2.) That the petition for removal was not filed in the State Court in time, under § 3 of said Act, not having been filed before or at the term of the State Court at which the cause could have been first tried.

After the reversal of the judgment, the cause could have been again brought to trial in the State Court before the filing of the petition for removal.

(Before BENEDICT, J., Eastern District of New York, October 29th, 1875.)

BENEDICT, J. This action was originally commenced in the Supreme Court of this State for the county of Kings, and, upon the petition of the plaintiff, has been removed to this Court by virtue of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) A motion is now made in behalf of the defendants to strike the cause from the calendar and remand it to the State Court.

One ground of this motion is, that this is not the Circuit Court for "the proper District," within the meaning of the 2d section of the Act of 1875. This ground is untenable. The 3d section discloses that what is meant by the proper District, is the District within the territorial limits of which the suit is pending in the State Court.

Another ground of the motion is, that the petition for removal was not filed in the State Court before or at the term of the State Court at which the cause could have been first tried, as required by section 3 of the Act. The facts upon which this objection rest are these: The action was originally commenced in 1869. It was thereafter referred to Mr. Strong, as referee, before whom the plaintiff recovered a judgment. This judgment was set aside by the Court of Appeals in September, 1874. The remittitur from said Court was filed November 16th, 1874. Before this time the referee died. There were terms of the Circuit in Kings county in October and November, 1874, and January, March and April, 1875. The petition for removal was not filed until April 24th, 1875. Upon these facts I am of the opinion that the petition for removal was not in time. Without determining the question whether the phraseology of the Act of 1875,

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differing as it does from the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 558,) would permit a removal in any case after one trial had been had and a judgment entered which was thereafter set aside, it is sufficient for the case if it be found that, after the reversal of the judgment, the cause could have been again brought to trial in the State Court before the filing of the petition. It is said that this cause could not be so tried, for the reason that a trial of the cause by a referee had been directed, and, the referee having died, and no other referee having been designated prior to the filing of the petition for removal, a trial was impossible. But, I think it must be determined otherwise, because, if it be supposed that the death of the referee did not, in law, revoke the order by which the cause was directed to be tried by Mr. Strong, then, after the death of Mr. Strong it was a matter of course, upon the application of either party, to designate a new referee, (*Juliand v. Grant*, 34 *How. Pr. Rep.*, 132;) and it lay within the power of either party to enter an order and bring the cause to trial during several terms of the Circuit prior to the removal. A cause tried before a referee may, for the purpose of the Act of 1875, be said to be triable at any term of the Court holden after the referee is ordered. But, if this be otherwise, and the Act of 1875 is to be confined to cases which are in a position to be tried in Court, before the jury or the Court, at an appointed term of Court, the result is equally fatal here, as, in that case, the pendency of the order of reference placed this case beyond the scope of the Act of 1875. If, on the other hand, it be supposed that the death of the referee worked a revocation of the order of reference, then, of course, the cause was triable at the first term after such death, and before the petition of removal was filed. In either case, the cause was in a position where it lay within the power of either party to bring it to a trial at the January Term, and that term must be considered to be the term at which the cause could be first tried, if any term subsequent to the first trial could be such a term.

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The motion to remand the cause to the State Court must, therefore, be granted.

*Starr & Ruggles*, for the plaintiff.

*Charles S. Lester*, for the defendants.

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LEWIS J. MULFORD AND OTHERS

vs.

## THOMAS D. PEARCE AND OTHERS. IN EQUITY.

The claims of the letters patent granted to Lewis J. Mulford and others, February 24th, 1874, for an "improvement in chains and chain links for necklaces, &c.," namely, "(1.) An ornamental chain for necklaces, &c., formed of alternate closed links *A*, and open spiral links *B*, substantially as shown and described; (2.) The open spiral links *B*, formed of coils of tubing, substantially as shown and described," cover new and patentable inventions.

The distinctive feature of the invention consists in constructing the open spiral link of annealed gold tubing, such link possessing a peculiar elasticity, and being easily separated and united to another link without any injury to itself or to the solid link into which it is sprung, and constantly preserving its elasticity and shape.

The first claim is not a claim for an ornamental chain composed of alternate closed links and open spiral links, without reference to the material of which the spiral link is made, but it is a claim for a chain composed of alternate closed links and open spiral links formed of one or more coils of gold tubing, as shown and described.

The process of making gold tubing was well known to manufacturing jewellers, and, therefore, it was not necessary to describe in the specification how it has to be made.

(Before SHIPMAN, J., Southern District of New York, November 3d, 1875.)

SHIPMAN, J. This is a bill in equity, alleging an infringement by the defendants of reissued letters patent which were issued to the complainants on February 24th, 1874, for an "improvement in chains and chain links for necklaces, &c.," and praying for an injunction and an account. The defendants, admitting in their answer the manufacture and sale of the patented article, deny the novelty or patentability of the alleged invention, and further insist that the patent is invalid by reason of the vagueness of the specification. The specification states, that the "invention has for its object to furnish an improved chain for necklaces, &c., having links of peculiar construction, which enable all the links to be finished separately, and then put together to form the chain. The invention consists in an ornamental chain, whereof the links are connected together by open spiral links *B*, finished before being connected together, the connection being made by springing the finished links into each other in the manner described. *A* and *B* represent the links of the chain. The links *A* are round and closed, and are made and polished or colored separately from the other links. The links *B*, which constitute the peculiar feature of my invention, are formed of one or more coils of tubing of the proper length, so as to form a double spring link. Into each end of the tube forming the link *B* is soldered a small shot, as shown in the drawing, which shot gives a finish to the link. The links *B* may then be colored or polished, and the chain is formed by springing the links into each other. \* \* \* By this construction, the links may be made and finished in quantities, and the chain formed from the finished links by springing them into each other, to produce any desired combinations of the links of the same or different kinds. Finishing the separate links in this way enables them to be more perfectly polished or colored, and with a greatly diminished expenditure of labor and time, and enables the links to be put together without injuring them in the least, however highly they may be polished or colored." The claims of the inventor are: "(1.) An ornamental chain for necklaces, &c., formed of alternate closed

links *A* and open spiral links *B*, substantially as shown and described; (2.) The open spiral links *B*, formed of coils of tubing, substantially as shown and described."

Ornamental gold chains, formed of alternate closed links and spiral links, or of spiral links alone, have long been known. Chains composed of split rings which are "sprung" into each other, or into a solid link, are familiar articles, and there can be no novelty in the mere shape or form of the chain, or of the link which is shown in the drawings of the patent. The distinctive feature of the invention does not consist in the fact that the link is spiral, but does consist in the construction of the open spiral link from a specified material, viz., gold tubing. The article which is called tubing, in the jeweller's art, is made by drawing a strip of gold through a draw-plate, the gold strip having been placed around a copper wire in such a manner as to encase the wire. The copper wire, with the strip of gold around it, is then wound upon a mandrel and cut into proper lengths. The copper is destroyed by acid, leaving a hollow spiral link, which is bound with wire and annealed. The wire is then unfastened, and the link which is thus made possesses a peculiar elasticity not affected by the annealing, is easily separated and united to another link without any injury to itself or to the solid link into which it is sprung, and constantly preserves its elasticity and shape.

The discovery which led to the invention consisted in the discovery of the fact that links made of tubing possessed a peculiar elasticity which was unaffected by annealing. The invention was the application of this discovery to the production of a new and useful result, namely, the manufacture from tubing of ornamental chains which possess the following elements of novelty and utility: *First*. All the links can be completely finished and then put together without injury to the chain, and thereby the article can be produced at a much less expense than had previously been necessary. Gold chains which are constructed in any other manner must be finished or polished or colored after the chain is completely formed,

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which is a difficult and somewhat expensive part of the manufacture, while, inasmuch as their links are sufficiently elastic to be united together or sprung upon a solid link without injury to any part of the chain, the separate links can be made in quantities, and completely finished and polished before being united. *Second.* The elasticity of the spiral links is such that the chain can easily be separated by the fingers of the owner, and united in different forms and for different purposes, and reunited in the original chain, without detriment to the polish of the links, and with no loss of their elasticity. As has already been suggested, these features of novelty and utility do not result from the fact that the chain is made in part from a spiral link, but from the fact that the spiral link is manufactured from a material which possesses a peculiar quality of permanent elasticity. The invention consists in the fact, that whether the inventor was or was not the first person to discover the peculiarity, he first utilized the discovery, and applied the peculiar property of the material to a useful result in the manufacture of chains.

It being self-evident that chains composed of spiral links have been well known, it was insisted by the defendants that the chains heretofore in use possessed substantially the same qualities which are attributed to the patented article, and that the patented article has no advantage over the chains which were introduced as exhibits, and which were made of gold split rings, or split links, in various forms. But, it was satisfactorily proved, that the split rings which are manufactured from solid gold wire compressed in dies, and made elastic by hammering, are not sufficiently elastic to permit the chain to be joined without injury to the material into which the split link is sprung, and this injury renders necessary a repolishing or finishing of the completed article. Again, if the chain of split gold links is taken apart, the act of separation causes the coil to spring asunder, so that it loses its shape and its beauty, and, if a necessity of annealing arises, the process of annealing destroys its elasticity. The difference between the patented article and a chain made of split gold

rings is clearly marked. It is a difference in kind and not merely in degree.

Testimony was also offered by the defendants to prove that chains of spiral links, made of tubing, had been in use prior to the date of the invention, but the evidence failed to satisfy me that chains of open and unsoldered spiral links, made of tubing, had been manufactured prior to the date of the patent. Links had been made of tubing, which, after being united in a chain, were soldered together, and thus a chain was made which could not be taken apart, and which required finishing and polishing after it was soldered together. The testimony did not show that the plaintiffs' invention of the open spiral link from tubing had been practically anticipated by others.

A large serpentine bracelet, made of a coil of gold tubing, to be worn upon the forearm, and to be kept in its place by pressure, was also introduced as an anticipating device. It manifestly is a very different article from a chain, and the fact that gold tubing was known and used in the manufacture of jewelry was conceded by the plaintiffs.

It was also suggested by the defendants, that the specification does not describe the process of manufacture of the spiral link with the exactness which is requisite. The manner in which gold tubing is manufactured is well known to all persons skilled in the art. After having been compressed around copper wire, it wound upon a mandrel, the wire is then removed by acid, and the coil of tubing, having been secured with wire, is annealed into the proper shape. This process is thoroughly understood by the manufacturing jeweller. It would have been a waste of words to explain the method of manufacture to a class of persons who are sufficiently informed, when they are told that the link is "formed of one or more coils of tubing of the proper length, so as to form a double spring link."

The first claim is not a claim for an ornamental chain composed of alternate closed links and open spiral links, without reference to the material of which the spiral link is made, but

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it is a claim for a chain composed of alternate closed links and open spiral links formed of one or more coils of gold tubing, as shown and described. The finish which is given to the chain by the shot at the end of the open link is not a material part of the invention.

There should be a decree for an injunction, and a reference to a master to take and state the account.

*Benjamin F. Lee and Alwyn A. Alvord*, for the plaintiffs.

*Joseph C. Fraley and Henry Baldwin, Jr.*, for the defendants.

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THE UNITED STATES vs. HORACE B. CLAFLIN AND OTHERS.

Section 4 of the Act of July 18th, 1866, (14 *U. S. Stat. at Large*, 179,) reproduced in § 3082 of the Revised Statutes, provides, that, "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law," "the offender shall be fined," &c. An indictment founded on this section described the merchandise as "certain goods, wares and merchandise, to wit, a large quantity of silk goods, to wit, six cases containing silk goods, of the value of \$30,000, a more particular description of which is to the jurors unknown," and stated that the goods were dutiable goods introduced into the port of New York from France: *Held*, that the indictment was not open to the objection, that the goods were not sufficiently identified, and the description of them not sufficient to enable the defendant to prepare his defence.

It is not necessary to describe property in an indictment with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy.

A reasonable amount of detail in describing property is all that is necessary in an indictment, and, if more detail is required, a bill of particulars may be demanded.



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An indictment under the said section need not set out the offence committed in the original importation, with the same particularity of time, place and circumstances that would be required in an indictment for the original offence.

Whether the said section applies to any other case than that of smuggled goods, *quere*.

The indictment having alleged that the illegality in the original importation of the goods was, that they had been "smuggled and clandestinely introduced into the United States," the charge must be confined to such illegality.

The averment that the goods were smuggled and clandestinely introduced into the port of New York from the Republic of France is a sufficient averment to enable the Court to say that the original importation was illegal, within the meaning of the statute.

The meaning of the word "smuggle," defined.

When technical words are used in an indictment, they must be taken to be intended to have their technical meaning.

In an indictment under the said 4th section of the Act of 1866, it is not a sufficient designation of the illegality of the original importation, to say, merely, that the goods had been imported and brought into the United States contrary to law.

(Before BENEDICT, J., Southern District of New York, November 5th, 1875.)

BENEDICT, J. This cause comes before the Court upon a motion to quash the indictment. The provision of law under which the defendants are charged, is section 4 of the Act of July 18th, 1866, (14 *U. S. Stat. at Large*, 179,) reproduced in section 3082 of the United States Revised Statutes. It is as follows: "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law," "the offender shall be fined, &c.," the offence being a misdemeanor. The indictment contains four counts. In the first the charge is that of concealing, in the second, that of facilitating the transportation, in the third, that of facilitating the sale, of certain merchandise. These three counts are similar in form, and the objections now to be considered apply to each of them. The fourth count is different, and will be considered by itself.

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The first objection which I examine is, that the goods, forming the subject of the transaction charged, are not sufficiently identified. The language used to identify the goods is as follows: "certain goods, wares and merchandise, to wit, a large quantity of silk goods, to wit, six cases containing silk goods, of the value of \$30,000, a more particular description of which is to the jurors unknown." There is also the additional statement that the goods were dutiable goods introduced into the port of New York from France. The rules by which the sufficiency of an indictment is to be determined have been too often stated to require repetition. These rules, as they have been understood and applied in the adjudged cases, are to be applied here. Their operation cannot be extended because of any embarrassment under which these defendants lie, because of the great extent of their business, and the large number of transactions, similar in character, which their dealings involve. Judged thus, the description under consideration will be found sufficient. Plainly, the language used shows the subject of the transaction to be within the scope of the statute creating the offence, for the statute in terms includes all kinds of merchandise. It is also clear, that the description in the indictment, together with such evidence as a trial must necessarily furnish, will fully protect in any future prosecution for the same offence. It is not necessary to describe property with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy. Says the Court, in *Regina v. Mansfield*, (1 C. & M., 140): "There must be some parol evidence in all cases, to show what it was that he was tried for before." The requisite notice of the offence charged is also to be found in the language used. The rule requiring notice of the offence charged is never so applied as to compel a description calculated to be fatal to the prosecution. A reasonable amount of detail in description is all that can be demanded for the purpose of informing the defendant. If, in any case, such reasonable detail prove insufficient to enable the defendant to prepare his defence, all possibility of injus-

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tice is removed by a bill of particulars, to which the defendant is entitled upon making oath that further particulars are necessary to enable him to defend. While speaking of a bill of particulars, it may be remarked, that the objections to a bill of particulars in a criminal case, because it cannot be certainly known that the bill of particulars describes the goods to which the attention of the grand jury was drawn, is an obvious one, and has been often urged, but has not been deemed of sufficient practical importance to overcome the advantages, both to the defendant and the prosecution, which follow from the practice. I have never heard a motive suggested as calculated to induce a public prosecutor to omit the presentation to the consideration of the grand jury of the goods that he must prove before the petit jury in support of the indictment which the grand jury find; and it cannot be presumed that the official representative of the United States, when called on to furnish a more detailed description of the goods presented by him to the consideration of the grand jury, would place on file a description of other goods. Experience has shown that the opposite presumption is sufficient to prevent injustice, and the practice seems established by the authorities. The description under consideration is not so deficient in detail as to be fatal to the indictment. It states that the articles bought were cases containing silk goods imported from France. It is true, that no numbers or marks are given; but marks and numbers may have been absent from the cases, and that for the purposes of concealment. The voyage of importation is not given, nor the name of the ship, nor that of the consignee; but such particulars are not necessarily disclosed by the cases or the goods, and are often wholly unknown; and, to require the various species of silk goods in the cases to be set forth, would open too wide the door for the defeat of the prosecution upon a question of variance. To demand the statement in the indictment of such particulars of description is to push the rule beyond reason. Furthermore, the grand jury have stated, in the indictment, that a more particular description is unknown to them.

That I do not go beyond the bounds of precedent in holding this description to be sufficient for the purpose of identifying the goods and enabling the defendants to prepare a defence, is made apparent by referring to some of the descriptions which adjudged cases show to have been approved. The words "one sheep" do not go far towards enabling an extensive grazier to prepare a defence. Such charges as "ten domestic fowls," "woolen cloth," "hay," "twenty-two pounds' weight of tin," "certain goods," "one post letter, the property of the Postmaster General," "one leg of mutton," "one book of the value of \$3," "divers goods," will all be found to have been considered sufficient to identify the subject of the charge in an indictment.

I pass, therefore, to consider the next objection—that the illegality in the importation of these cases is not properly stated. In support of this objection, the proposition is advanced, that an indictment for buying goods which have been brought into the United States contrary to law must set out the offence committed in the original importation, with the same particularity of time, place, and circumstances that would be required in an indictment for the original offence. Such a proposition cannot be maintained. The offence of knowingly buying smuggled goods is similar in character to that of receiving stolen goods, so much so that it has been conceded that the rule applied to indictments for receiving stolen goods may be properly applied to this indictment. The concession is fatal to the objection under consideration. The rule applying to indictments for receiving stolen goods is thus given by Roscoe: "It is not necessary to state in the indictment the name of the principal felon, and the usual practice is merely to state the goods to have been before then feloniously stolen." (*Roscoe's Criminal Ev.*, 885; see, also, 2 *Wharton*, §§ 1899, 1900.) Archbold gives the form thus: "one silver tankard, goods and chattels of J. N., before then feloniously stolen." In *Rex v. Jervis*, (6 *C. & P.*, 156,) it was expressly adjudged unnecessary to say by whom the principal offence had been committed. The same rule has been applied in cases of other offences than

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that of receiving stolen goods. Thus, in a prosecution under the English statute which makes it an offence to "receive any post letter, \* \* \* the stealing, or taking, or embezzling, or secreting whereof shall amount to a felony under the post office Act, knowing the same to have been stolen, taken, embezzled, or secreted," the indictment, as given by Archbold, (441,) charges, that "one post letter, the property of the Postmaster General, before then from and out of a certain post-letter bag feloniously stolen, J. S. feloniously did receive and have, knowing," &c. So, under 16 and 17 Victoria, where the offence is being in company with more than four others, "with any goods liable to forfeiture under this or any Act relating to the customs," the indictment, as given by Archbold, (869,) charges that J. S., "being then in company with divers persons to the jurors unknown, to then number of five and more, was found feloniously with certain goods then liable to forfeiture under and by virtue of a certain Act, to wit, an Act," &c.

I next consider the position taken in support of this motion, that the indictment, to be good, should not only confine the charge to the dealing in smuggled goods, that is, goods secretly run into the United States without passing through the custom house, but also should state facts from which the Court can determine such to have been the character of the importation referred to. It seems unnecessary to determine, in this case, whether section 4 of the Act of 1866 can be applied in any case other than that of smuggled goods, for, whether the general words of the Act are intended to cover other cases or not, this indictment is confined to such a case. Here, the pleader having, by the use of the words of the Act, brought the charge within the scope of the statute, has proceeded to limit the charge to a dealing in smuggled goods. The illegality of the original importation is, in express terms, stated to consist in this, that said goods have been smuggled and clandestinely introduced into the United States. The case of *United States v. Thomas*, (4 *Benedict*, 370), is authority to show that the effect of adding such words to the words of the

Act is to confine the charge to the illegality thus described. Thus the indictment itself furnishes an answer to the first branch of the objection under consideration ; and this language of the indictment has been here relied on by the prosecution as answering the argument made to show that section 4 of the Act of 1866 is confined to cases of smuggled goods.

The second branch of the objection in hand is, that averring the goods to have been smuggled and clandestinely introduced into the port of New York from the Republic of France, is not giving such a statement as enables the Court to say that the original importation was illegal, within the meaning of the Act of 1866. But, as already shown, the particularity of the statement respecting the act of importation required in charging the smuggler, is not required in charging the buyer of smuggled goods. In the case of the buyer, the act to be proved is the buying of certain goods, and the guilty knowledge which makes the act criminal is knowing the goods to have been smuggled. Here, the act of the defendant intended to be proved is stated with particularity of time, place, and subject-matter, and the guilty knowledge required by the Act is shown by the averment that the defendants knew the goods to have been imported contrary to law, as aforesaid, that is to say, in this, that they had been smuggled into the United States.

The word "smuggle" is a technical word, having a known and accepted meaning—"a necessary meaning in a bad sense." It implies something illegal, and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods, with intent to avoid payment of duty. As such it is used by itself alone, and in the statutes even. It is used in section 4596 of the Revised Statutes, in a provision relating to seamen, where an "act of smuggling" plainly is supposed to mean such an act as above described, and none other. The word is used in the same technical manner in the English statute, (16 and 17 *Victoria*, chap. 107, § 244), where it is deemed sufficiently descriptive of a particular illegal employment in a ship, to designate it as "a smuggling ship."

This technical meaning of the word has taken the form of a statutory definition in the moiety Act of June 22d, 1874, (18 *U. S. Stat. at Large*, 186,) where it is declared, that the act of "smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles, without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination." What is smuggling for the informer when he claims his reward must also be smuggling for the goods as to which he informs.

But, it is asked here, and the question is one which can be asked with equal significance in many cases—How does it appear that the goods which the grand jury have designated as smuggled are smuggled goods, within the legal acceptation of the word? The answer is, that, when technical words are used in an indictment, they must be taken to be intended to have their technical meaning. In an indictment for uttering counterfeit money, it is sufficient to say that the defendant "uttered" the money, without stating the circumstances which are supposed to amount to an uttering. Under the statute making it an offence "to impair the Queen's current coin," it is sufficient to use the words "did impair;" and, under another statute, to say, "did deface." (*Archbold*, 748, 749.) Where the Act reads, "shall import or receive into the United Kingdom counterfeit coin," it is sufficient to say, "did import from beyond the seas." (*Archbold*, 751.) The present indictment is within the principle of these precedents.

The real difficulty of the defendants does not lie in the form or the matter of the indictment, but in the fact that the charge made does not conform to the proofs which they suppose the Government to have, and, upon the argument, this was put forth as matter of complaint, and the District Attorney was challenged to admit that none of the goods referred to in the indictment were smuggled goods; but, it cannot in this way be made to appear that the indictment is bad. Nor

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is a motion like the present adapted to secure relief from such a difficulty.

I have now considered the objections urged against the first three counts of the indictment. It remains to consider the fourth and last count. This count is likewise based upon section 4 of the Act of 1866. The difference between it and the other counts is, that, in assigning the illegality of the original importation, it uses simply the words of the statute, averring only that the goods had been imported and brought into the United States contrary to law. If the Act of 1866 is confined in operation to a single form of illegality, it might be questioned whether a count like this, in an indictment for a secondary offence, would not be supported by the authorities already referred to; and, certainly, there is weight in the argument derived from the repealed provisions of section 16 of the Act of 1842, the provision of the moiety Act of 1874, and the general features of the revenue laws, to show that illegalities and frauds committed in regard to the value, description, invoice and ascertainment of the amount of duties to be paid upon goods which come into the custody and under the supervision and scrutiny of the officers of the customs, are excluded from the operation of the Act of 1866. But, there are other forms of illegality, as, for instance, the introduction of prohibited goods, where the intent to avoid payment of duties does not exist, the introduction of goods packed in prohibited methods, and the like, which do not appear to be so excluded, and, if several forms of illegality are intended to be covered by the words of the Act, it would seem that the illegality should be designated with more particularity than is afforded by the words "imported contrary to law." When the language of a statute comprehends, under general terms, divers forms of illegality, having different characteristics, it may well be considered proper to require something more than the words of the Act. In cases of receivers, it is usual to state whether the goods received were goods stolen or goods obtained by false pretence. For this reason, and because such a count, based upon this same statute, has been condemned in



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a reported case in this Circuit—the case of Thomas, above referred to—I am of the opinion that the fourth count of this indictment should be rejected.

My determination upon this motion, therefore, is, that the fourth count of the indictment be quashed, and that, as to the other counts, the motion be denied.

*Benjamin B. Foster*, (*Assistant District Attorney*), for the United States.

*William M. Evarts*, for the defendants.

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LEVI DECKER vs. WILLIAM H. GRIFFITH & Co. IN EQUITY.

THE SAME vs. CHARLES SILVERBRANDT. IN EQUITY.

The claim of the reissued letters patent granted to Levi Decker, March 9th, 1869, for an "improvement in cushions for billiard tables," the original letters patent having been granted to him December 18th, 1866, namely, "The catgut or other cord E, partially or fully imbedded, or otherwise attached, at the angle *a* of the rubber cushion C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth," is not void for want of novelty, by reason of anything found in the letters patent granted to William, K. Winant, August 10th, 1858, for "improvements in cushions for billiard tables."

In the Winant patent, a strip of steel merely lies in a crease or groove cut in the rubber, and is kept in place without being attached by screws, cement or otherwise. In the Decker patent, the cord is described as being moulded or imbedded entirely within the rubber.

But, it appearing that, before Decker's invention, billiard tables were made in accordance with the Winant patent, but with the added feature of an arrangement for tying down the steel strip to the cushion, by means of holes in the lower edge of the strip and wires put through them and fastened to the under side of the rail, to keep the strip in place in the rubber, and it further appearing, that, prior to Decker's invention, billiard table cushions were

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made by one S., with a French clock spring placed in a slit cut in the upper face of the rubber, parallel to and near the inner face of the rubber, and cemented into the slit, and cloth cemented over the slit: *Held*, that a suit founded on the Decker patent could not be maintained against billiard tables so constructed, or against an arrangement like that of S. but with a round wire substituted for the steel strip.

(Before BLATCHFORD, J., Southern District of New York, November 5th, 1875.)

BLATCHFORD, J. The patent sued on in these cases, being a reissue granted to the plaintiff, Levi Decker, March 9th, 1869, on the surrender of the original patent granted to him December 18th, 1866, for an "improvement in cushions for billiard tables," has been heretofore the subject of consideration by this Court in the case of *Decker v. Grote*, (10 *Blatchf. C. C. R.*, 331). The invention set forth in the specification of the patent has reference to a cushion formed of india rubber. The specification says: "My invention has for its object the preservation of cushions for billiard tables against the impact of the ball. The nature of my invention consists in the employment or use of a catgut or other strong cord, located in or at the upper corner or edge of the cushion, and immediately at the point against which the ball strikes when the game of billiards is played. \* \* \* C is a body of rubber, which forms a cushion against which the ball strikes. This said rubber cushion has its inner or face side bevelled in such a manner that the ball strikes, at about its centre, against the upper corner or point of the cushion, as clearly shown at *a*, fig. 1. For the purpose of protecting the upper corner or edge of the cushion C, against the impact of the ball, I make a small concave or bed, immediately, or as near as may be, in the upper corner of the cushion, so that a suitable cord, E, or other support, may be fitted longitudinally, the whole length of the said cushion; around the table, so that the cushion is fully protected on all sides of the table against the impact of the ball. For this cord and support of the cushion I usually employ catgut, or cord may be used for the same purpose; but experience proves that catgut is most suitable for the purpose, as it is best adapted to prevent the cushion from giving way or yielding under the impact of the ball, it being understood

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that the ball only comes in contact with the cushion at *a*, the bevel or inclination being given the face of the cushion in order that all other parts of it will be kept clear of the ball. This cord *E* may be more thoroughly secured in its position by moulding it or imbedding it entirely within the rubber, near the corner, so as to perform the functions for which it is designed, or it may be secured by gluing a strip of cloth *b* over it, when not fully imbedded in the rubber, or it may be secured by any other well-known means. *D* is a strip of elastic cloth, which is cemented to the face side of the rubber strip or cushion *C*, and attached, at its lower edge, to the lower part of *D*," (elsewhere described as a strip or cleat, behind *C*,) "so as to support the upper edge *a* of *C*. It will be understood that the cord *E* is attached to *D* before the latter is secured to the cushion *C* and cleat *B*. To make the whole more secure, I usually cover the whole with the cloth *F*, and after cover the whole again with the usual green cloth *G*. This cord *E* performs two very important functions, viz., it gives stiffness to the angle or corner *a* of the cushion *C*, so that it cannot yield or give way under the impact of the ball, to allow the latter to pass over it; and it also gives prominence to the said angle, so as to present, under the yielding of the cushion, a stiff, narrow line to the ball, thus obviating much friction, so as not to impede the motion of the latter, and still not interfering in the least with the elastic effects of the cushion upon the ball." The claim is: "The catgut or other cord *E*, partially or fully embedded, or otherwise attached, at the angle *a* of the rubber cushion *C*, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth." In the case of *Decker v. Grote*, it was said, in the decision of the Court: "It is quite apparent, that the invention set forth is the placing and firmly securing along the upper edge or corner of the rubber cushion a strong, narrow cord, to receive the impact of the ball, and protect the cushion against such impact, by reason of its being placed at the point against which, and against which alone, the ball strikes. When the impact comes, the

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stiff cord receives it in substantially a horizontal direction, and prevents the cushion from giving way under such impact, and allowing the ball to ride over it and leave the table, while, at the same time, there is little friction from the impact, and the elastic force of the rubber acts fully through the cord interposed between it and the ball, to repel the ball in substantially a horizontal direction." The arrangement used by the defendant in that case was to imbed the cord in the rubber cushion, at the upper edge of it, by placing it there while the rubber was plastic, and before it was vulcanized, and by having a thin portion of the rubber interposed between the cord and the outside of the edge. It was held, that such arrangement embodied the invention claimed in the patent, and had the same mode of operation in use. The novelty of the invention was challenged in that case by the citation of an application for a patent filed by one Carpenter, in January, 1858, and rejected in April, 1858, of a patent to one Sycher, granted in November, 1863, and of abandoned experiments made by one Delaney, in California, but the patent was sustained against those objections.

Subsequently, in the case of *Decker v. Griffith*, (10 *Blatchf. C. C. R.*, 343,) the use of a round metallic wire in the manner in which it is used by the defendants in the suit secondly above entitled, was held, by this Court, to be an infringement of the Decker patent.

The alleged infringement complained of in the first above entitled suit consists in the use of a flat strip of metal, fitting in a slot moulded in the india rubber cushion, and running from end to end thereof, and strained by a straining key at its end. The strip is capable of moving in the direction of its length, when strained, though it is held firmly endwise at all times. The strip lies parallel with the inner inclined face of the cushion, and closely adjacent to it, and its upper edge is closely adjacent to the upper inner corner of the cushion. The alleged infringement complained of in the second above entitled suit consists in the use of a round metallic wire, arranged

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in like manner with the flat strip of metal, and situated in close proximity to the upper inner corner of the cushion.

It is contended, on the part of the defendants, that what they use, in so far as it is like what is described and claimed in Decker's reissae, existed prior to Decker's invention; in other words, that a narrow cord or wire of metal or other equivalent material, placed and firmly secured along and within, and closely adjacent to, the upper edge or corner of the rubber cushion, so as to receive the impact of the ball, existed before Decker's invention. Decker testifies that he "got the idea" of his invention in the fall of 1864, he thinks, in September; that he thinks he made cushions of tables complete, embodying the invention, in the fall of 1864; and that he is quite certain he did so before March, 1865.

The defendants introduce and refer to a patent granted to William K. Winant, August 10th, 1858, for "improvements in cushions for billiard tables." The specification of that patent sets forth that the invention of Winant "consists in the introduction of a strip of spring steel (or equivalent material), into a crease or groove cut in the upper face of the rubber, near the angle thereof, in such a manner that said steel is protected from injury by the rubber which thus intervenes between the steel and the ball, and the cushion is rendered sufficiently firm to prevent the ball imbedding and injuring the correctness of the angle of deflection; and beside this, the strip is so narrow as not to be injured by the concussion, and is retained in place without requiring any attachment by screws, cement, or otherwise. \* \* In the upper part of the cushion *d*, and near its edge, I make a long incision parallel to its edge, and at a slightly greater inclination than the face of the cushion, and into said crease or groove, thus formed, I introduce a narrow, thin strip of steel *i*, or equivalent material, and the covering *e*, of cloth, or other material, as usual, completes the cushion. It will be apparent that said strip *i* is retained in place by the rubber, and acts to prevent the ball imbedding, and at the same time is itself protected from injury by the rubber on both sides." There is one feature in

this patent of Winant's which is unlike the arrangement of Decker. Winant describes his strip of steel as merely lying in the crease or groove cut in the rubber, and as being kept in place without being attached by screws, cement, or otherwise; whereas Decker describes his cord as being moulded or imbedded entirely within the rubber. The patent of Winant's was considered, and very properly, by the Patent Office, when Decker's patent was reissued, as not having anticipated Decker's claim in his reissue.

It is shown by the evidence of Daniel D. Winant, the brother of William K. Winant, that, prior to 1864, he made many billiard tables, constructed in accordance with the Winant patent, but with the added feature of an arrangement for tying down the steel strip to the cushion by means of holes in the lower edge of the strip, and wires put through them and fastened to the under side of the rail, to keep the strip in place in the rubber. In that arrangement the steel strip was incorporated in the structure, so as to be incapable of dislodgment, quite as effectually as if moulded or embedded entirely within the rubber, as suggested in Decker's specification. It stiffened the angle or corner of the cushion, and prevented its yielding under the impact of the ball, and allowing the ball to pass over it. It presented, substantially, the same features and mode of operation shown in the defendants' arrangement in the first above entitled suit, where the flat strip of metal is used, so far as there is anything in common between the plaintiff's arrangement and that of the defendants. The greater or less inclination of the strip to the face of the cushion, the greater or less proximity of the face of the strip to the inner face of the cushion, the greater or less width of the strip, and the greater or less proximity of its upper edge to the upper corner of the cushion, are questions of degree only, so long as the effective feature of the defendants' arrangement is found in the earlier structure, in connection with the use of the strip, which is shown to be the fact.

It is also shown, that one Stevens, in Boston, prior to 1864, made india rubber cushions for billiard tables, which had a

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French clock spring placed in a slit cut in the upper face of the rubber, parallel to and near the inner face of the rubber, bringing the upper edge of the spring near the upper corner of the rubber. The spring was cemented into the slit, and cloth was glued or cemented over the slit. The spring was thus imbedded entirely within the rubber. A portion of a cushion of such construction, made prior to 1864, by Stevens, is produced. It contains the features presented by the defendants' arrangement with the flat strip, so far as the latter is like the plaintiff's arrangement.

As to the defendants' arrangement with the round wire imbedded in the rubber, it required no invention to substitute, in the Stevens arrangement, a round wire for the steel strip. If the plaintiff's reissued patent can, in view of the Winant and Stevens arrangements, above described, be upheld at all, because it is made to cover a cord imbedded entirely within the rubber, and is not limited, as his original patent was, to a cord applied outside of the upper corner of the cushion, it certainly cannot be extended to cover arrangements which are substantially the same as the Winant and Stevens arrangements.

The bill must be dismissed, with costs.

*William J. A. Fuller*, for the plaintiff.

*Edward N. Dickerson*, for the defendants.

GEORGE A. MORRISON AND OTHERS *vs.* CHESTER A. ARTHUR.

The 8th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 210,) provides for a duty of 60 *per cent. ad valorem* on "silk veils," and for a duty of 50 *per cent. ad valorem* "on all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for."

The term "silk veils," in the absence of any other language in the statute, includes all veils made of silk, and the presumption is that "crape veils," being manufactured of silk, are embraced within the term "silk veils."

But, if it be shown, that, in trade and commerce, "crape veils" are not "silk veils," that is, are contradistinguished from "silk veils," and are commercially known as different articles from "silk veils," and that the term "crape veil" is a distinctive term, which distinguishes the article called by that name from a "silk veil," then the term "silk veil" fails to designate a "crape veil," and "crape veils" are dutiable under the clause of the statute relating to manufactures of silk.

(Before SHIPMAN, J., Southern District of New York, November 15th, 1875.)

SHIPMAN, J. This is an action of assumpsit, to recover moneys paid under protest for duties which were exacted by the defendant, as collector of the port of New York, upon crape veils imported by the plaintiffs in the year 1871. The defendant pleaded specially, that the moneys alleged to have been paid were had and received by the defendant, as said collector, "in payment for duties due from plaintiffs to the United States on certain importations from a foreign country into the port of New York," and that said moneys "constitute a part of the lawful duty of sixty *per cent. ad valorem* then due and owing to the United States by plaintiffs, for the duty at said rate on silk veils then and there imported as aforesaid, which said silk veils were dutiable accordingly under section eight of the Act of Congress entitled, 'An Act to increase duties on imports and for other purposes,' approved June 30th, 1864," and that the said amount of duty "was and is the true and lawful duty on the said silk veils." The replication of the plaintiffs averred, that they ought not to be barred, &c., be-



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cause "they say, that the articles imported by the plaintiffs were not silk veils, and were not, at the time of the importation and entry thereof, liable to a duty of sixty *per cent. ad valorem*, but the same were a manufacture of silk, and were crape veils, and, at the time of the passage of said Act, approved June 30th, 1864, and before and at the time of their importation, they were commercially known, among importers and dealers, and were bought and sold, as crape veils, and never otherwise, and were liable to a duty of fifty *per cent. ad valorem*, as a manufacture of silk." To this replication the defendant demurred generally.

The portion of the 8th section of the statute of June 30th, 1864, (13 *U. S. Stat. at Large*, 210,) which is material, is as follows: "That, on and after the day and year aforesaid, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected and paid, on the goods, wares, and merchandise enumerated and provided for in this section, imported from foreign countries, the following duties and rates of duty, that is to say, \* \* \* \* on silk vestings, pongees, shawls, scarfs, mantillas, pelerines, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch chains, webbing, braids, fringes, galloons, tassels, cords and trimmings, sixty *per centum ad valorem*; on all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty *per centum ad valorem*." The question of law which is presented by the pleadings is—Are veils which are not silk veils, but are a manufacture of silk, and are known commercially as crape veils, and not otherwise, liable to a duty of sixty *per cent.*?

The eighth section of the Act of June 30th, 1864, was intended to be a comprehensive section, and to include all articles made of silk, or of which silk is the component material of chief value, by whatever name the articles are known, or for whatever purpose they are used. Congress intended to embrace in one section all the manufactures of silk, and to provide that all the articles which are specifically enumerated,

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in the first clause which has been quoted should pay sixty *per cent.*, and that all articles which are not specifically enumerated in the section should pay fifty *per cent.* (*Smythe v. Fiske*, 23 *Wallace*, 374.)

Bearing in mind that the main object of the section was to classify articles according to the material of which they are composed, it is first important to determine the construction which should be given to the term "silk veils," as used in this section of the statute. Two facts are to be noticed—first, that general terms only are used in this section; and next, that it is not claimed that the term "silk veils" is a commercial term, or that it is a commercial designation of any one kind of veils which are made of silk. It is a term which is used in the ordinary signification which belongs to the words of which the term is composed, and, in the absence of any other language in the statute, includes all veils made of silk. "When general terms are used, the terms are to be taken and applied in their ordinary and comprehensive meaning, unless it is shown, (as, I understand, it is not claimed to be shown in this instance,) that they have, in their commercial use, acquired a special and restricted meaning." (*Lottimer v. Smythe*, 17 *Int. Rev. Record*, 12.) It is to be presumed that these words include any veil which is made of silk, although such veil is styled by the importer by a particular name which designates the class or subdivision to which the particular veil belongs. Thus, if the different styles of silk veils are called by different names, such as Honiton, or Brussels, or Point d'Alençon, and are exclusively called by such specific names, their different classes or styles are still silk veils, and are included within the general term, which is used not for purposes of specific description, but as a comprehensive term to include all veils made of a particular material. Importers cannot withdraw their goods from the operation of the general terms of a statute, which classifies goods according to the material of which they are made, by imposing upon those goods specific names, which designate a particular kind or subdivision of the general class which is mentioned in the statute. "When the goods which are sub-

jects of duty are designated by the material of which they are made or composed, the statute is to be construed as presumptively including such goods, by whatever subordinate or specific name they may be known, and though all in the commercial world are in the habit of using the specific name when they speak of the particular article in question. For example, if we have a tariff Act which imposes a particular duty upon cotton goods, if that designation alone is used in the legislation pertaining to the subject of duty upon the importations, it presumably includes all cotton goods, even though importers, merchants, dealers and customers, all the country through, when they speak of a particular kind of goods made of cotton, always give the special name of the article; as, for example, under this attempted illustration, muslin, cambric muslin, cotton drilling, cotton shirting, cotton sheeting." (*Jaffray v. Murphy*, 19 *Int. Rev. Record*, 143.) The presumption is, then, that crape veils, being manufactured of silk, are included in the general words of the statute, and are embraced within the term "silk veils," and that presumption will not be rebutted or weakened by proving, merely, that the term "crape veils" is used to discriminate between the kind of veils which is called by that name, and the various other kinds of veils which are made of silk, although it could be shown that the entire body of importers designated this particular article by no other name than crape veils. The mere name which is exclusively applied to the different species of veils is immaterial.

But there is another principle which is well settled in the construction of tariff Acts, and which is, that Congress must be understood, in the tariff laws, to class articles according to the general usages and known denominations of trade, and, generally, to recognize, in the tariff Acts, the known commercial distinctions which are made in the usages of trade, unless Congress has indicated, by the language of the statute, an intention to exclude any other classification than the one which it has adopted, or any modification of the classification which it has adopted. Inasmuch as this eighth section is a compre-

hensive section, intended to include all silk articles, if the first clause was the only clause of the statute which was applicable to veils, such an intention would perhaps be manifested. The statute would then be construed to impose a duty of sixty *per cent.* upon all veils which are made of silk. But, the statute also provides, that all manufactures of silk, not otherwise provided for, shall pay a duty of fifty *per cent.* The plaintiffs contend that their goods, being a manufacture of silk, have been, by commercial usage, expressly declared not to be silk veils, and that, in commercial language, they are not made of silk, and having been so declared, and the statute having provided that all other manufactures of silk shall pay a prescribed duty, that this case is brought within the principle which I have just stated. In this position they are sustained by the decisions which have been given both recently and formerly upon this subject.

In order to avail themselves of this principle, the plaintiffs aver, in their replication, that the goods which they imported were not silk veils, but were a manufacture of silk, known as crape veils, and not otherwise. If, under this replication, it is proved, that, in trade and commerce, crape veils are not silk veils, that is, are contradistinguished from silk veils, and are commercially known as different articles from silk veils, and that the term "crape veil" is a distinctive term, which distinguishes the article called by that name from a silk veil, then the term "silk veil" fails to designate a crape veil, and crape veils are dutiable under the clause of the statute which relates to manufactures of silk. If crape veils have thus, in commercial usage, been separated and set apart from the general class to which they presumptively belong, the law infers that Congress did not intend to include them among the general class, there being another clause in the statute in which they may be placed. There is, then, a question of fact for the triers to determine, which is, whether these articles are known in trade and commerce as silk veils or not; in other words, are crape veils known in trade as a different article from a silk veil, and, commercially, are they regarded as forming a separate and dis-

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tinct class of goods from silk veils, and, in commercial language, to be other than silk veils? Inasmuch as this issue of fact is directly presented by the replication, which avers that the veils are not silk veils, and is an issue which, if found in favor of the plaintiffs, is a successful answer to the defendant's plea, the demurrer should be overruled.

The principles which are involved in this case have recently been fully considered by the late Circuit Judge, in *Lottimer v. Smythe*, (17 *Int. Rev. Record*, 12,) and *Jaffray v. Murphy*, (19 *Int. Rev. Record*, 143,) which cases also arose under the silk section of the Act of June 30th, 1864. The general rule of law in regard to the effect of commercial usage and designations upon the construction of the tariff laws, is also declared in 200 *Chests of Tea*, (9 *Wheat.*, 430;) *Elliott v. Swartwout*, (10 *Peters*, 137;) *Curtis v. Martin*, (3 *Howard*, 106;) *Mailard v. Laurence*, (16 *Howard*, 251;) and *United States v. Breed*, (1 *Sumner*, 159.)

The demurrer is overruled, with leave to the defendant to plead anew.

*Benjamin L. Ludington* and *George D. Lord*, for the plaintiffs.

*Henry E. Tremain*, (*Assistant District Attorney*), for the defendant.

## THE UNITED STATES

vs.

JAMES A. POLHAMUS AND EUGENE J. JACKSON.

A paymaster in the army speculated in stocks, employing the defendants as his brokers. To make good his losses, and pay his obligations to the defendants, he embezzled funds of the United States, intrusted to him, and remitted to the defendants at least \$358,000 of Government funds, of which sum at least \$93,000 had been sent in his official checks upon the assistant treasurer of the United States, in the city of New York, payable to the order of the defendants, and the residue in currency, or in checks on private bankers or on national banks. This suit was brought to recover the amount so received by the defendants, on the ground that they knew that the money was the money of the Government, and had been improperly used, or that they received the money with notice of facts from which they could only properly infer that the paymaster was unlawfully expending the funds of the Government in payment of his private debts. The jury found for the defendants. On a motion for a new trial, made by the plaintiffs, on the ground that the verdict was so against the evidence, or against the weight of evidence, that it was apparent that the jury were influenced by mistake, sympathy or prejudice: *Held*, that the motion must be granted.

The motion would not be granted if the claim were solely for the amount sent otherwise than in official checks.

The jury were properly charged, that, where a trustee delivers, in payment of his individual debt, property which is stamped with the insignia of ownership as trustee, the creditor takes the property with notice of the trust, and at his peril, if he does not make suitable inquiry as to the right of the trustee thus to dispose of the property.

The defendants, in explanation, gave evidence that their business was large, and that their time was so engrossed that they could not examine checks, and that they endorsed checks without looking at the face of the check, and that, therefore, they did not know that these were sub-treasury checks. The Court was of opinion that the case, so far as it concerned such checks, turned, in the minds of the jury, on such evidence, and that the magnitude of the amount involved in the suit, and the serious detriment which would accrue to the defendants from a verdict against them, while such a verdict would be of very slight value to the plaintiffs, in consequence of the insolvency of the defendants, had some influence on the minds of the jury.

(Before SHIPMAN, J., Southern District of New York, November 19th, 1875.)

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The United States v. Polhamus

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SHIPMAN, J. Major J. Ledyard Hodge, a paymaster in the United States Army, commenced, in the year 1863, to speculate in stocks in the city of New York, employing the defendants as his brokers. These stock speculations were at first of comparatively small amount, but increased, after the year 1867, until they had attained very large magnitude. From time to time they resulted very disastrously to Major Hodge, who, in order to make good his losses, and pay his obligations to his brokers, embezzled the funds of the United States, with which he was intrusted, until the deficit was discovered in the month of September, 1871, when he was dismissed from office, and pleaded guilty to charges of embezzlement. It was satisfactorily ascertained, either from his own confession, or by evidence derived from an examination of his accounts, that at least \$358,000 of Government funds had been remitted by him to his brokers, of which sum at least \$93,000 had been sent in his official checks upon the assistant United States Treasurer, in the city of New York, and the residue had been sent in currency, or in checks upon private bankers, or upon national banks. The checks upon the Assistant treasurer bore respectively the following dates, and were for the following amounts: December 15th, 1865, \$5,000; September 25th, 1869, \$20,000; September 27th, 1869, \$13,000; September 28th, 1869, \$15,000; and July 18th, 1870, \$40,000. An action of *indebitatus assumpsit* was thereupon commenced by the United States against the defendants, for the recovery of the amount which had been thus received by them, upon the ground that they knew that the money was the money of the Government, and that it had been improperly used by Major Hodge, or that they received the money with notice of facts from which they could only properly infer that the trustee was unlawfully expending in payment of his private debts the funds of his *cestui que trust*. This action was tried before a jury, who returned a verdict for the defendants. The Government thereupon filed a motion for a new trial, upon the ground that the verdict was so against the evidence, or against the weight of evidence, in the cause, that it was apparent that

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the jury were influenced by mistake, sympathy or prejudice, and upon the ground that the charge and rulings of the Court were erroneous.

Upon the point that the verdict was against evidence, it is not strenuously urged that, as to the amount which was sent in currency, or in private checks, the evidence against the defendants was of such uniform character as to demand a new trial, though it is claimed that the verdict was against the weight of evidence in respect to those sums; but it is claimed that, as to the \$93,000 which was sent and received in official drafts upon the sub-treasury, the jury mistook the charge of the Court, and rendered a verdict palpably in violation of the evidence which was introduced. If the claim of the Government against the defendants had been solely for the amount which was sent in currency, or in unofficial checks, I do not think that a Court would be justified in directing a new trial. As to the amount which was sent in official checks, the case rested upon different principles from those which appertained to the residue of the plaintiffs' claim. These checks were the checks of Major Hodge, as paymaster of the United States Army, upon the well known depository of the funds of the Government, to the order of the defendants, and were sent directly to the payees, in payment of the private debts of the drawer, and were collected and credited upon the account of Major Hodge. Upon this part of the case, the Court charged the jury in conformity with the rule of law, that, when a trustee delivers, in payment of his individual debts, property which is stamped with the insignia of ownership as trustee, the creditor takes the property with notice of the trust, and, if it is received without making suitable inquiry as to the right of the trustee thus to dispose of the property of the *cestui que trust*, the recipient takes it at his peril. He is guilty of negligence if no suitable inquiry is made. The general rule was laid down with sufficient fullness. But, the fact that the property bears upon its face the evidence that it is owned by the seller or the payer, as trustee, is not conclusive upon the liability of the defendant, who is always at liberty to show that



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he did make suitable inquiry. If he receives property which is known to be trust property, he is *prima facie* liable to the *cestui que trust*, and the burden is thrown upon the defendant of explaining his conduct to the satisfaction of the jury. The defendants in this case offered evidence which was proper to go to the jury in explanation and justification of their acts. They gave evidence that their business during the period which was included in their transactions with Major Hodge, was enormously large; that their time was so engrossed that they could not examine checks; that checks were endorsed, when presented to them, by the person whose business it was to make the deposits, without examination or without reading, or looking at the face of, the check; and, therefore, that they did not know that these were sub-treasury checks. I have reason to know that the case, so far as it concerned this class of remittances, turned, in the minds of the jury, upon the evidence which was thus offered by the defendants, of their want of knowledge upon whom the checks were drawn. I was of the opinion, at the time of the trial, that the case was not such as to justify a direction to the jury to find a verdict for \$93,000 in favor of the plaintiffs. There was a question of fact which involved a large amount of property, and which involved, to some extent, the character of the defendants, which was proper to be submitted to a jury. I am still of the opinion that it should have been so submitted, or else that the principle of trial by jury is not to be regarded. But, I am of opinion, after careful consideration of the case, that the evidence was such that the supervisory power of a Court should be interposed, and that the facts should be submitted to the scrutiny of another jury. It is not necessary for me to consider the subject of new trials upon the ground that the verdict was against the weight of the evidence. The principles of law are well known. It is sufficient for me to say, that if the plaintiff in this case was an individual *cestui que trust*, whose property had been thus placed by an unworthy trustee in the hands of the defendants, I should not feel satisfied that my duty had been discharged until I had remitted the question to the test

of a new trial ; and, although the treasury of the Government is in the annual receipt of millions, and a favorable verdict for the amount which is at stake will perhaps be of no serious benefit to the United States, while a verdict against the defendants may have the effect of permanently crippling those whom financial reverses have already rendered insolvent, yet it is the duty of a Court to regard solely its obligations as a Court of justice, and not to be swayed by the comparative effect of its decisions upon the parties. The magnitude of the amount which is involved in this case, and the serious detriment which would accrue to the defendants from a verdict against them, while such a verdict would be of very slight value to the plaintiffs, I think had some influence upon the minds of the jury.

I have doubted whether the discretionary power of the Court should be exerted in favor of a new trial, when an exceedingly intelligent and capable jury had once rendered a verdict, after an absence of only fifteen or twenty minutes, and when, in consequence of the insolvency of the defendants, a different verdict, if it should be rendered, would in all probability be of no pecuniary value to the United States, but I am satisfied that these considerations are subordinate to those which I have already stated.

The plaintiffs also moved for a new trial upon the ground of error of law in the charge and rulings of the Court. It is not necessary to consider these questions, in view of the disposition which has been made of the motion.

The motion for a new trial is granted.

*Henry E. Tremain*, (*Assistant District Attorney*), for the plaintiffs.

*Roger A. Pryor*, for the defendants.

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Fry v. Quinlan.

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WILLIAM F. FRY *vs.* JEREMIAH QUINLAN. IN EQUITY.

After a bill in equity had been filed for the infringement of a patent for an invention, the patent was surrendered, and a reissued patent was granted. The plaintiff then moved for leave to file a supplemental bill founded on the reissued patent and for an injunction: *Held*, that the motions must be denied, on the ground that, by the surrender and reissue, the suit was at an end, and that the plaintiff must proceed by original bill founded on the reissued patent.

(Before JOHNSON, J., Southern District of New York, December 6th, 1875.)

JOHNSON, J. The original bill was filed under a patent which has been since surrendered under the statute. (*U. S. Rev. Stat.*, sec. 4914.) Upon the surrender, a new patent was issued according to the same statute. Thereupon, the complainant applies for leave to file a supplemental bill founded upon the reissued patent, and asks for an injunction.

In the case of *Moffitt v. Garr*, (1 *Black*, 273,) Mr. Justice Nelson, giving the opinion of the Supreme Court upon the effect of section 13 of the Act of Congress of July 4th, 1836, (5 *U. S. Stat. at Large*, 122,) says: "The construction given to this section, \* \* \* and the practice under it, in case of a surrender and reissue, are, that the pending suits fall with the surrender. A surrender of the patent to the Commissioner, within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence can no more be the foundation for the assertion of a right after the surrender, than could an Act of Congress, which has been repealed. It has frequently been determined, that suits pending, which rest upon an Act of Congress, fall with the repeal of it. The reissue of the patent has no connection with, or bearing upon, antecedent suits; it has as to subsequent suits. The antecedent suits depend upon the patent existing at the time they were commenced, and, unless it exists and is in force at the time of trial and judgment, the suits fail." It is true that the point

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decided in that case was, that the surrender barred an action at law for a previous infringement; but the ground upon which the decision is put is equally applicable to a suit in equity. The right is the same in either case; the remedy only is different. It is not perceived how a surrendered patent can be the foundation of relief in equity any more than at law. The case of *Dental Vulcanite Co. v. Wetherbee*, (3 *Fisher's Pat. Cas.*, 87,) is referred to in support of the complainant's motion; but the case only shows that, in the District of Massachusetts, it is in fact the usual practice to file a supplemental bill upon a reissued patent, in aid of a bill based upon the original patent before its surrender. It does not appear how, or upon what view of the rights of the parties, that practice was established. The statute only declares that the reissued patent, with the corrected specification, "shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form." (*R. S.*, § 4916.) But this declaration gives no countenance to the idea, that the reissued patent can be availed of to sustain and render effectual a suit the basis of which is taken away by the act of the party in surrendering his patent. It is not in general the function of a supplemental bill to restore or renew a cause of action which has ceased to exist. Such a bill, on the contrary, rests on the equity of the original bill, and seeks to apply it under altered circumstances, but in the enforcement of the same right. Taking this view of the law, the complainant is not entitled to file the supplemental bill, and, of course, is not entitled to the preliminary injunction prayed for.

In order to avail himself of any rights he may have upon the facts stated in the supplemental bill, the complainant must proceed by original bill founded on the reissued patent, as was done in *Orr v. Badger*, (7 *Law Reporter*, 465.)

The motions must be denied.

*George H. Yeaman*, for the plaintiff.

*Charles Goepp*, for the defendant.

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The United States v. James.

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THE UNITED STATES, ON THE RELATION OF ORAN C. MICHELS

vs.

THOMAS L. JAMES, POSTMASTER OF THE CITY OF NEW YORK.

A clause of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 377,) increasing the rate of postage on certain mail matter, is not unconstitutional, although it originated in the Senate and was not an amendment to a bill for raising revenue, originating in the House of Representatives, because it is not a bill for raising revenue, within the meaning of *article 1, section 7, subdivision 1*, of the Constitution, which provides that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills."

A bill establishing rates of postage is not a bill for raising revenue, within the meaning of the Constitution.

Post office laws may be revenue laws without being laws for raising revenue.

(Before JOHNSON, J., Southern District of New York, December 6th, 1875.)

JOHNSON, J. The question upon the merits presented in this case is, whether a clause of the Act of Congress, approved March 3d, 1875, (18 *U. S. Stat. at Large*, 377,) entitled, "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30th, 1876, and for other purposes," is or is not constitutional. The clause referred to increases the rate of postage upon third-class matter from one cent for two ounces to one cent an ounce. The ground of fact on which it is claimed that this clause was not constitutionally enacted is, that the clause originated in the Senate, and was not an amendment to a bill for raising revenue, originating in the House of Representatives. The provision of the Constitution, which is claimed to render invalid the clause in question, is this: "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills." (*Const., art. 1, section 7, subd. 1.*)

Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the Government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen ; they give no direct equivalent in return. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them. Their immediate responsibility to their constituents, and their jealous regard for the pecuniary interests of the people, it was supposed, would render them especially watchful in the protection of those whom they represented. But the reason fails in respect to bills of a different class. A bill regulating postal rates for postal service, provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed service for the fixed rate, or he lets it alone, as he pleases and as his own interests dictate. Revenue, beyond its cost, may or may not be derived from the service and the pay received for it, but it is only a very strained construction which would regard a bill establishing rates of postage as a bill for raising revenue, within the meaning of the Constitution. This broad distinction existing in fact between the two kinds of bills, it is obviously a just construction to confine the terms of the Constitution to the case which they plainly designate. To strain those terms beyond their primary and obvious meaning, and thus to introduce a precedent for that sort of construction, would work a great public mischief. Mr. Justice Story, in his Commentaries on the Constitution, (*sec.* 880,) puts the same construction upon the language in question, and gives his reasons for the views he sustains, which are able and convincing. In Tucker's Blackstone only, so far as authorities have been referred to, is found the opinion that a bill for establishing the post office operates as a revenue law. But this opinion, although put forth at an early day, has never

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obtained any general approval; but both legislative practice and general consent have concurred in the other view.

Another question has arisen, which has some similarity with that under discussion, and which, unless adverted to, might give rise to misapprehension. Thus, in *United States v. Bromley*, (12 How., 88), the question was, whether an Act of Congress which gave a writ of error in any civil action brought by the United States for the enforcement of the revenue laws of the United States, embraced within its meaning an Act to reduce rates of postage and to prevent frauds on the revenue of the post office department. It was held, that the latter Act was, within the meaning of the former, a revenue law of the United States, and that the writ of error could be sustained. The Court says: "Revenue is the income of a State, and the revenue of the post office department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the Government as moneys collected for duties on imports." All this may be conceded, without involving the conclusion that such a law is an Act for raising revenue.

The case of *Warner v. Fowler*, (4 Blatchf. C. C. R., 311,) though involving other statutes, was put substantially upon the same ground as the preceding case. It was an action against a postmaster for not delivering certain letters. The defendant claimed that, in detaining them, he acted under the laws in relation to the post office department, and that he was entitled to have the suit removed to the United States Circuit Court, under the statute, as being for an act done under the revenue laws of the United States. This claim was sustained by Judge Ingersoll, holding the Circuit Court in this District. The decision was, in my opinion, correct, upon the ground that, while the post office laws are revenue laws, within the meaning of the statutes cited, they are not laws for raising revenue, within the provision of the Constitution.

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Clifford v. Coleman.

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The motion for a mandamus should be denied.

*John W. Weed*, for the relator.

*Henry E. Tremain*, (*Assistant District Attorney*), for the defendant.

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NEIL CLIFFORD vs. JOHN COLEMAN AND OTHERS. IN EQUITY.

A motion to amend a bill, by adding new parties defendant, after replication filed and the production of evidence, it appearing that the plaintiff was in a position to make the amendment before replication filed, refused.

(Before JOHNSON, J., Southern District of New York, December, 7th, 1875.)

JOHNSON, J. An application to amend the bill after replication and the production of evidence ought to be accompanied by very satisfactory proof that the proposed amendment could not, with reasonable diligence, have been sooner introduced into the bill. The amendment asked for is to add as parties defendant George H. Newbold and Susanna Newbold individually and as executrix of John A. Newbold, deceased. Upon the case, as presented to me on this application, I am satisfied that the complainant was in a position to make the proposed amendment, certainly before the replication was filed, and that he ought not now to be allowed to change his case, according to the rules governing amendments, at such a stage of the cause.

Motion denied.

*R. B. McMaster*, for the plaintiff.

*George Gallagher*, for the defendants.



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The United States v. Lawrence.

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THE UNITED STATES *vs.* CHARLES L. LAWRENCE.

Under § 1 of the Act of April 5th, 1866, (14 *U. S. Stat. at Large*, 12,) now § 5418 of the Revised Statutes of the United States, which provides a penalty for the forging of "any bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States," the words "other writing" includes an owner's oath required to be taken before making an entry of goods at the custom house, and an import entry, and an importer's bond.

The fact that § 3 of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 739,) now § 5445 of the Revised Statutes of the United States, punishes as a misdemeanor all acts done in effecting an entry of goods, furnishes no reason why forgery of writings used in entering goods at the custom house should not be punished under § 1 of the Act of April 5th, 1866.

It is not necessary that an indictment founded on § 1 of the Act of 1866, and alleging the forgery of writings used in entering goods at the custom house, should allege the existence of the goods mentioned in the writings.

(Before BENEDICT, J., Southern District of New York, December 8th, 1875.)

BENEDICT, J. This case comes before the Court upon a demurrer to the indictment. The indictment contains nine counts, in sets of three each. The first count of each set charges the forging of a certain writing for the purpose of defrauding the United States. The second count of each set charges the uttering of a similar writing, with like intent. The third count of each set charges, that the defendant did transmit to, and present at, an office of an officer of the United States, a writing similar to that set forth in the other counts. In each count the writing is set forth at length. The writing set forth in the first set of counts is what is known as an owner's oath, required by law to be taken before making an entry of goods at the custom house. The writing set forth in the second set of counts is an import entry. The writing in the third set of counts is an importer's bond. The indictment is framed under the Act of April 5th, 1866, (14 *U. S. Stat. at Large*, 12,) now found reproduced in section 5418 of the United States Revised Statutes, which provision provides a

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penalty for the forging of "any bid, proposal, guarantee, official bond, public record, affidavit or other writing, for the purpose of defrauding the United States."

The first position taken in support of the demurrer is, that the rule of construction, according to which general words are restricted by particular words, should be applied to this statute, and the meaning of the words "other writings," in this provision, restricted so as to exclude from the operation of the statute such writings as are set forth in this indictment. The rule here invoked is not an arbitrary rule, but one of many resorted to for the ascertainment of the intent of the legislator, when such intent is not otherwise apparent. To apply it to all general words would often defeat the intention of the legislator, and such, in my opinion, would be its effect if applied to this statute. Nothing in the language used, nor in the mischiefs intended to be remedied, nor in the circumstances under which the statute was enacted, indicates that the words "other writings" were used in a restricted sense, but the contrary. Various writings are mentioned, but these writings have no common object, nor any characteristic features common to all, from which to infer an intention to restrict the effect of the provision to any particular class of writings. The language of the statute furnishes, therefore, no criterion by which to restrict its general words. This statute, at the time of its enactment, its title and its language show, was passed in consequence of the decision of the Circuit Court in the case of *The United States v. Barney*, (5 *Blatchf. C. C. R.*, 294.) In that case, the defendant was charged under the Act of March 3d, 1823, (3 *U. S. Stat. at Large*, 771,) with forging a bond similar in character to the one set out in this indictment. The Court held that the bond was not covered by the Act of 1823, because that Act was limited to writings forged for the purpose of obtaining money of the United States. The forging of all writings other than those made for the purpose of obtaining money of the United States being found to be unpunished by the Act of 1823, the Act of 1866 was passed almost immediately thereafter, and in consequence of the announcement of

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that decision. The object of the Act was to cover the forging of writings found to be without the scope of the Act of 1823. This is made apparent by comparing the title and the language of the Act of 1866 with the Act of 1823.

It is further to be observed, that the Act of 1823 considered by the Court in the case of Barney, contains the same general words found in the Act of 1866, used in the same way. But it was not contended in that case that the bond counted upon was not covered by these general words, while the tenor of the opinion of the Court plainly shows that the general words "other writings," in the Act of 1823, were considered as having their natural and general meaning, and not as restricted by the particular words used in connection therewith. The opinion of the Court upon the Act of 1823 affords, therefore, strong support to this indictment.

Furthermore, inasmuch as the Act of 1866, enacted under the circumstances stated, uses the words of the Act of 1823, now under consideration, the inference must be, that those words were intended to be understood in the new Act as they had been understood by the Court in the former Act. The intention of the legislator being thus disclosed, there is no room, therefore, for the application of the rule of *ejusdem generis*.

But, it is said, some limitation of the general words of the Act of 1866 is rendered necessary by the provisions found in the 3d section of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 739), reproduced in section 5445 of the Revised Statutes. The argument is this: The Act of 1863 punishes as a misdemeanor all acts done in effecting an entry of goods. The writings set out in this indictment appear, on their face, to be elements of the act of entering goods, and, if held to be covered by the Act of 1866, an absurdity will result, because, while the completed transaction is punished as a misdemeanor, a part of it may be selected out and be punished as a felony. Therefore, it is said, the statute of 1866 must be construed as not applicable to any writing within the scope of the statute of 1863, according to which the act here complained of would be punishable under the Act of 1863, and not under the Act of

1866. In respect to this argument, assuming, for the present, that the offences created by the statute of 1863 are misdemeanors, and those created by the statute of 1866 are felonies, it is to be observed, that the statute of 1863 does not necessarily include an act of forgery, nor, indeed, any act done in the preparation of papers preliminary to an entry of goods. A full and proper effect is given to the Act of 1863, by construing it as applicable to the act of entering goods, and of aiding in making an entry. Moreover, the entry, to be punishable under the statute of 1863, must be made at less than the true weight or measurement, or by a false classification as to quantity or value, or by the payment of less than the amount of duties legally due. But, none of these features appear here, and it cannot, therefore, be said, that the acts here complained of are punishable under the statute of 1863. Besides, it is plain that an act which, under some circumstances, may be an element of a transaction also punishable as a substantial offence, may, by itself, be an offence when made such by a statute. It would hardly be supposed that a defence to an indictment for forgery would be made out by showing that the forged paper was used to extort money, although, in such case, an indictment would lie for the misdemeanor as well as for the felony; and no absurdity arises although the punishment attached to the felony be greater than that prescribed for the misdemeanor.

It must also be remarked, that, to complete the offence created by the statute of 1866, it is not necessary that the United States should have been actually defrauded. The act of forgery, done with the intent to defraud the United States, is the act punishable by the statute of 1866, and the statute takes effect when the forgery is committed, although no entry of goods be made, or any other act done towards the completion of the fraud; and this consideration appears to answer the remaining ground urged in support of this demurrer, that the indictment is bad because it does not aver the existence of such goods subject to duty as are referred to in the writings set out. The existence of such goods would naturally appear in prov-

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ing an intent to defraud the United States, but it is possible that the forgery of those writings with the purpose of defrauding the United States, may be shown without proof that, in fact, there were at the time any such goods.

Moreover, in determining whether the writing set forth is sufficient, without extrinsic averments, to sustain a charge of forgery, "all the extrinsic circumstances tending to the fraud, which are implied in the writing, shall be taken to exist." (*The People v. Stearns*, 21 Wend., 409.) Certainly, the existence of such goods is implied in the writings set forth in this indictment. It is not necessary, in an indictment for forgery, to set out such a state of things existing in fact, that the writing, if genuine, would necessarily or probably affect a right of the United States. When the writings appear, by their language, to be such that they might have the effect to defraud the United States, it is sufficient to set them out, averring generally the intent to defraud the United States, but omitting all extrinsic circumstances. (See *The People v. Stearns*, above referred to, and the cases there cited.)

For these reasons I am of the opinion that the demurrer must be overruled.

*Benjamin B. Foster*, (Assistant District Attorney), for the United States.

*Benjamin F. Tracy*, for the defendant.

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Lewis v. Gould.

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EDWIN M. LEWIS, TRUSTEE, &amp;C.

vs.

JAY GOULD AND OTHERS.

Under § 914 of the Revised Statutes of the United States, a pleading in a suit at law in this Court, which is not authorized in a like suit in a Court of this State, will be set aside on motion.

The common law forms of pleading are no longer necessary in the United States Courts within the State of New York, nor are they admissible, except as they may be deemed to be substantially a compliance with the requirements of the Code of Procedure of the State, as to pleadings.

(Before JOHNSON, J., Southern District of New York, December 14th, 1875.)

JOHNSON, J. The defendants move to set aside the replication, upon the ground that the pleading is not authorized by law. It is entirely clear that, if this suit were in the Supreme Court of the State of New York, the pleading in question would be unauthorized, and might be set aside. The question is, whether that is also the law of the United States Courts in this District. The answer to this question is given by section 914 of the United States Revised Statutes, which enacts that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes, in the Courts of record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding." No language can be more direct or plainer than this to convey the will of the Congress, that the pleadings in the Circuit and District Courts shall be conformed to those employed in the State practice, "as near as may be." The qualification contained in this last phrase is not to be construed to subvert the command

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of the statute: "As near as may be" allows only necessary variations from the State methods, growing out of the different organization of the Courts, and other similar matters.

No one can doubt, that, if the Code of Procedure of New York had existed as the law of the State in 1789 and 1792, the practice, pleadings and modes of procedure which it contains would, by force of the process Acts of those years, have been adopted into and become the law of the Circuit and District Courts of the United States within this State. Nor is there any more doubt that such was the intent and is the effect of the section in question. The common law forms of pleading are no longer necessary in the United States Courts within the State of New York, nor are they admissible, except as they may be deemed to be substantially a compliance with the requirements of the Code of Procedure of the State, as to pleadings. The same view of this statute was taken in *Butler v. Young*, by Sherman, J., in the Circuit Court for the Northern District of Ohio, (7 *West. Jur.*, 59,) and the same principles of interpretation were applied to the former process Acts. (*Fenn v. Holme*, 21 *How.*, 481; *United States v. Keokuk*, 6 *Wallace*, 514.)

The motion to set aside the replication must be granted.

*Sanford, Robinson & Woodruff*, for the plaintiff.

*Thomas G. Shearman*, for the defendants.

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The Merchants' and Manufacturers' National Bank v. Wheeler.

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## THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK

vs.

GEORGE M. WHEELER.

Under section 3 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 471,) which requires the application to the State Court for the removal of a cause into the Circuit Court of the United States, to be made "before or at the term at which said cause could be first tried," the term referred to is a term occurring after the passage of the Act, and not a term before such passage. Where an action at law removed under said Act is at issue when removed, no other or different pleadings are necessary than those in the State Court.

(Before JOHNSON, J., Southern District of New York, December 21st, 1875.)

JOHNSON, J. The defendant's first application to remove the cause seems to have been abandoned on account of defects supposed to exist in the papers presented to the State Court. The subsequent application, which is to be regarded as made on the 27th of April, 1875, avoided the defects of the papers used on the prior application. The rule being now settled, that the application, if sufficient, by law is effectual to remove the cause, however it may be disposed of by the State Court, the question now is whether the defendant was in time under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) The Act was passed after the commencement of the March Circuit, and the application was made during the succeeding circuit term, and before the actual trial of the cause. If, therefore, the statute means, by the phrase "before or at the term at which said cause could be first tried," a term occurring after the passage of the Act, then, beyond question, the application was in time. That such is the meaning of the statute many considerations concur to prove. The Act defines anew the jurisdiction of the Circuit Courts, making it substantially as extensive as the Constitution permits, excepting cases where the Supreme Court has original jurisdiction. It then proceeds



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to declare, in substance, that every civil suit of which original jurisdiction might be taken by the Circuit Court, shall, if brought in a State Court, be removable into the Circuit Court, whether then pending or thereafter brought. This is the grant of authority, and it defines the subjects on which it is to operate, as all suits, pending or to be brought. All are to be removable. What follows is merely detail as to the manner in which the power is to be exercised. It should receive a construction in harmony with the grant of power. By section 3, the party seeking a removal, is to apply "before or at the term at which said cause could be first tried." If this is taken to mean a term which occurred before the passage of the law, it to that extent renders nugatory the provision making all suits removable, and excludes from the privilege that large number of cases in which a term at which the cause could be tried had previously passed by. There is no reason for such a distinction, and the clause should be construed to relate to a term occurring after the Act in question became a law. The question has been examined and decided in the same way by Judge Swing, of the Southern District of Ohio, in *Andrews' Ex'rs v. Garrett*, (2 *Central Law Jour.*, '797.)

I consider this cause as removed to this Court according to law, and the motion to remand it should be denied.

A motion is also made to set aside, as irregular, a rule entered in the common rule book, on the defendant's motion, requiring the plaintiffs to file and serve a copy of the declaration, or be non-prossed. The cause was at issue in the State Court, and a copy of the record there had been entered in the Circuit Court, as the statute requires, and then the statute goes on to prescribe, that, "the said copy being entered, as aforesaid, in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court." As the mode of pleading in this State is the same in the United States Courts as in the State Courts, in actions other than in equity or admiralty, by force of section 914 of the Revised Statutes, no other or different pleadings were necessary than those in the State

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Court, and the rule entered was, therefore, irregular. (*Lewis v. Gould, ante, p. 216.*)

These rules must, on the plaintiffs' motion, be set aside.

*Stillman K. Wightman*, for the plaintiffs.

*Thomas M. Wheeler*, for the defendant.

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THE FREEMAN'S NATIONAL BANK OF BOSTON

*vs.*

C. EDGAR SMITH, ASSIGNEE IN BANKRUPTCY OF THE PENSACOLA LUMBER COMPANY. IN EQUITY.

Under the statute of New York (2 R. S., 467, 468, §§ 58 to 66,) providing for the voluntary dissolution of corporations, it is necessary, on the presentation of the petition for dissolution, that an order should be entered calling on all persons interested, to show cause against the prayer of the petition at a time not less than three months from the date of the order. If this be not done, the proceedings are invalid.

Under § 5122 of the Revised Statutes of the United States, it is necessary that a petition by a corporation involuntary bankruptcy should be authorized by a vote of a majority of the corporators at a legal meeting called for the purpose. Where the owner of stock in a corporation dies before such meeting is held, leaving no will, and no administration on the estate is granted before the corporation is adjudged bankrupt, there is, as to such stock, no corporator. Such meeting is not one of the meetings of stockholders, provided for in § 21 of the statute of New York, in regard to the formation of corporations (*Act of February 17th, 1848; Laws of 1848, chap. 40, § 21, p. 59.*) and it is not necessary it should be called in the manner prescribed by said section.

(Before JOHNSON, J., Southern District of New York, December 21st, 1875.)

JOHNSON, J. Upon the question of the jurisdiction of the Supreme Court of New York, to make the order dissolving

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the Pensacola Lumber Company, I agree with the learned District Judge, and for the reasons which he has assigned. It is only after the notice required by the statute, that the proper judicial authority of the Court to pronounce a judgment of dissolution arises. In the presentation of the petition, the statute does not merely permit, but absolutely requires, an order to be entered calling upon all persons interested, to show cause against the prayer of the petition at some time and place not less than three months from the date of the order. So far, the only power, even of a discretionary character, to be exercised by the Court, is the fixing of the time and place and person for the making of the proper inquiries. Upon the coming in of that report, the judicial power of the Court is to be exercised. If it shall appear to the Court that the corporation is insolvent, or that, for any reason, a dissolution thereof will be beneficial to the stockholders and not injurious to the public interests, a decree of dissolution is to be made. (*N. Y. R. S.*, vol. 2, 467, 468, §§ 58 to 66.) The inquiry concerns not only the parties who are interested in the corporation, but also the public at large. For this reason, especially, is it necessary that a complete compliance should be exacted, with all the preliminary conditions upon which the power of the Court to pronounce a dissolution is by the statute made to depend. The provisions in respect to notice stand in the place of the ordinary process or other proceeding for the commencement of a suit, and, until they are complied with, the authority of the Court to act judicially on the subject-matter of the petition does not arise. In this case, it appears affirmatively, that, almost immediately upon the presentation of the petition, an order of dissolution was pronounced, instead of an order to show cause, as required by the statute. For this order there was no authority by law, and it was, in my judgment, invalid for all purposes.

Assuming this conclusion to be well founded, the next question is as to the validity of the adjudication in bankruptcy. The adjudication is assailed upon the alleged ground that the petition was presented without proper authority. The statute,

(*R. S. sec. 5122*.) requires a petition of an officer of a corporation, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose. In this case, the corporation was such as the Act includes, and the petition was made by an officer of the corporation, and was made in pursuance of a resolution adopted at a meeting of which all the living corporators had notice, and which was called for the purpose expressed in the notices, of acting on the subject of the bankruptcy, and which was attended, in person or by proxy, by all the living corporators, save the owner of one share, out of the 760 shares into which the capital stock was divided. The resolution, moreover, received the assent of all the corporators present and represented at the meeting. The owner of 190 shares of the stock, one J. D. Gardiner, had died on the 14th of February, twelve days before the meeting. He left no will, and administration had not been granted on his estate when the adjudication in bankruptcy took place. So far, therefore, as that part of the stock was concerned, there was no corporator, for, no one but the legally constituted representative of the deceased could make title to the shares, and no such representative then existed. It must, therefore, either be declared to be the law, that the death of a stockholder in a corporation suspends its power to take the necessary steps to go into bankruptcy, or that the language of the statute is satisfied when the word "corporator," as therein used, is taken in its primary and obvious sense, and as meaning the persons who are legally entitled to that character. It is, of course, plain, that neither Mrs. Gardiner, the widow, nor Mr. Gardiner, the son, of the deceased corporator, his next of kin, became corporators or stockholders upon his death; and, therefore, no action or assent on their part is of any weight in determining the question presented to the Court, although neither of them, nor the absent stockholder, Knight, has raised any objection to the proceeding. It seems to me, that the sensible and just construction of the statute is the primary and obvious one, that only existing corporators are within the contemplation of the statute. Otherwise, this very important

power of a corporation is made dependent upon the accident of the life or death of the owner of a single share of stock.

It is claimed, that the 21st section of the New York Act authorizing the formation of manufacturing corporations, (*Act of February 17th, 1848, Laws of 1848, chap. 40, § 21, p. 59,*) prescribes the mode of calling stockholders' meetings, and that its provisions were not complied with in respect to the meeting in question. But, the answer to this is, that the stockholders' meetings referred to in the section cited, are those held for one of the purposes specified in the section, which has no relation to stockholders' meetings in general. The named purposes are, to increase or diminish the amount of capital stock, to extend or change its business, or to avail itself of the privileges or provisions of the Act. Neither of these purposes includes or is equivalent to the object or purpose of the meeting in question, and, of course, the provisions of the section have no application in the present case.

The grounds above stated cover substantially the argument on which the motion for an injunction was urged. I should have gone over them more at length, but that the interests of the parties on both sides require, and they have requested, a speedy decision. I have, therefore, considered the matter upon its merits, and have not inquired whether the bill is to be deemed to be founded upon the supervisory power of this Court over proceedings in bankruptcy, under section 4986 of the Revised Statutes, or whether it is sustainable on the ordinary grounds of equitable jurisdiction, upon the facts alleged in this case.

The injunction asked for must be denied, and the temporary injunction must be dissolved.

*Thomas M. North*, for the plaintiffs.

*William R. Darling*, for the defendant.

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The Hanover National Bank v. Smith.

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## THE HANOVER NATIONAL BANK

vs.

BENJAMIN E. SMITH, IMPEADED WITH CLARK R. GRIGGS.

An action at law at issue in a State Court was called for trial therein, and might, in the ordinary course, have been tried. The defendant applied for a postponement. This was refused by the Court, except upon terms of the defendant's consenting to a reference. This he refused to do, but afterwards, and before the trial was actually commenced, he consented to a reference of the same for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. The defendant then took proceedings to remove the cause into this Court, under section 639, subdivision 3, of the Revised Statutes of the United States, on the ground of prejudice or local influence. On a motion by the plaintiff to remand the cause to the State Court: *Held*, that the defendant had waived his right to claim a removal of the cause under the section above named.

A party to a suit may, in that particular suit, waive his right to remove the suit to the Federal Court; and he may make such waiver after the suit is brought, not only by a stipulation or agreement, but by conduct which is equivalent to a waiver.

(Before JOHNSON, J., Southern District of New York, January 6th, 1876.)

JOHNSON, J. In this case, the removal into this Court was claimed under section 639, subdivision 3, of the Revised Statutes, and was obtained accordingly. A motion is now made to remand the cause, as improperly removed. Before a trial had actually taken place, the defendant took the steps pointed out by the statute, to effect the removal, upon an affidavit by the defendant, stating that he had reason to believe, and did believe, that, from prejudice or local influence, he would not be able to obtain justice in the State Court. The plaintiff was a citizen of New York, and the defendant Smith of Ohio; while the other defendant, who had neither been served with process, nor appeared, was a citizen of Delaware. They were sued upon several liabilities—Griggs as first

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endorser, and Smith as second endorser, of a promissory note.

The plaintiff urges, that the removal cannot be sustained, because the petitioner had, by consenting to a reference of the cause for trial by a particular person named, selected his own tribunal, and had, by thus consenting, prevented an immediate trial of the cause. This, the plaintiff insists, should preclude the petitioner from claiming a removal of the cause, under the subdivision of the section of the statute referred to. Two questions are thus presented—*first*, whether the right of removal in a particular case can be waived; and, *second*, whether such a waiver should, in this case, be imputed to the defendant.

Upon the first of these questions we are not without an intimation of the opinion of the Supreme Court, in *Insurance Co. v. Morse*, (20 *Wallace*, 445.) In that case, under a law of Wisconsin, a New York insurance company, as a condition of permission to transact its business of insurance in Wisconsin, had made and filed in the office of the Secretary of State of that State, an appointment of an agent or attorney within that State, upon whom process might be there served, and had also filed a written engagement that suits commenced in the State Court should not be removed into the Courts of the United States, by the act of the corporation. It was held by the Court that neither the law of Wisconsin, nor the agreement of the parties, could give validity to a general engagement, made in advance of any controversy, that the party would not avail himself of a resort to the jurisdiction of the Courts of the United States. Mr. Justice Hunt says, in giving the opinion: "He cannot bind himself in advance, by an agreement which may be specifically enforced, to forfeit his rights, at all times, and on all occasions, whenever the case may be presented." This statement of the ground of the decision is preceded by other remarks, disclosing the line of distinction between this general and not lawful renunciation, and other particular acts of renunciation which the law will sustain. He says: "In a civil case, the party may submit his

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particular suit, by his own consent, to an arbitration, or to the decision of a single judge. So, he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects, any citizen may, no doubt, waive the rights to which he may be entitled." The instances given show, that, in the waiver of the right to resort to the Courts of the United States, in a particular case, only the private right of the individual is concerned. Its waiver touches no question of public policy. Its effectiveness stands upon the maxim, that any man may renounce a legal right which is conferred for his own advantage. The right in question may, therefore, be waived by any sufficient agreement of the party, as well by direct consent, as by that implied by the non-exercise of the right in the manner prescribed by law. A stipulation after suit commenced in the State Court would, I think, be, on the principles mentioned, a complete bar to the exercise of the right of removal; and, on the same ground, any conduct of the party which is equivalent to such a waiver ought to be enforced as such by the Court.

In respect to the second question stated, an examination of the facts presented is necessary. The case was called for trial, and might, in the ordinary course, have been tried, when the defendant applied for a postponement. This was refused by the Court, except upon terms of the defendant's consenting to a reference. This he, in the first instance, refused to do; but afterwards, and before the trial was actually commenced, he consented to the reference of the cause for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. Under these circumstances, the defendant ought to be considered as estopped from making an application to remove the cause. The case is not, in my judgment, within the meaning of the statute. Its language is general, but the right it gives is the right of the party concerned, and he may waive it. It is to be construed as if the right to waive its benefit were expressed in the statute. The defendant was in time to



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apply for a removal when his case was called for trial, but his consenting to a reference, under the circumstances shown, ought, in justice, and does, I think, in law, preclude him from a subsequent application to remove the cause. To hold otherwise, would recognize a consent to a reference as an allowable resort to gain the postponement of a cause, and the consequent extension of the time limited for its removal into the Circuit Court.

The motion to remand the cause to the Supreme Court of the State of New York must be granted.

*Tracy, Olmstead & Tracy*, for the plaintiffs.

*Lewis Sanders*, for the defendant.

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ORRIN A. BILLS

*vs.*

THE NEW ORLEANS, ST. LOUIS AND CHICAGO RAILROAD  
COMPANY.

An action at law commenced in a State Court by summons and complaint was removed into this Court before issue joined. Before removal, an attachment had been issued in the suit, according to the law of the State, and a reference made to take the deposition of a witness to be used on a motion in the suit. After removal, the defendant entered a rule in this Court requiring the plaintiff to declare, and the plaintiff entered a rule in this Court requiring the defendant to plead. The plaintiff now moved to set aside the first rule, and the defendant moved to set aside the second rule, and the plaintiff also moved for leave to proceed in the reference so made and pending, in accordance with the statute of New York: *Held*, that all three of the motions must be granted. As a complaint had been put in in the State Court, no further pleading on the part of the plaintiff was necessary.

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Nor was there any occasion for the plaintiff to enter a rule to plead against the defendant, there being no such practice in the State Court.

The provisions of sections 646, 914 and 915 of the Revised Statutes of the United States, and of sections 4 and 6 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 471, 472,) show an intention to secure in each State one method of procedure in all common law cases, and to attain that result by adopting, in general, the procedure of the State Courts in the respective States.

The distinction between law and equity is preserved, both in substance and in procedure, and the provisions of positive statutes of the United States are not invaded; but, in the absence of such provisions, the State practice prevails.

(Before JOHNSON, J., Southern District of New York, January 6th, 1876.)

JOHNSON, J. This cause was commenced by summons and complaint in the Supreme Court of the State of New York. An attachment was obtained in the case according to the law of the State, and, in the course of the proceedings to render the attachment effectual, a reference was made to Mr. Edsall to take the affidavit or deposition of one Kelly, to be used on a motion in the action. While this reference was pending, the action was removed, on the application of the defendant, to this Court. The action was founded upon a claim at law, as distinguished from equity, and had not reached an issue when it was removed, no answer having been put in.

As a complaint had been put in in the State Court, no further pleading on the part of the plaintiff was necessary, and there was, consequently, no occasion for entering a rule requiring him to declare. That rule, taken by the defendant, must be set aside.

On the same ground, there was no occasion for the plaintiff to enter a rule to plead against the defendant; for, in that respect, also, the practice in the Circuit Court must be conformed to that in the State Court, in obedience to section 914 of the Revised Statutes. That rule must, also, be set aside.

The plaintiff further asks for an order of this Court in respect to the attachment proceedings and the reference ordered therein, pending which the cause was removed to this Court. Several provisions of the statutes of the United States bear upon this question. In addition to the provisions of section 914 of the Revised Statutes, by which the practice, pleadings,

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and forms and modes of proceeding in the State Courts, as they may exist from time to time, are adopted, to govern in the Circuit and District Courts, in civil causes other than equity and admiralty, the next section, (915,) contains a distinct rule in respect to attachments. By that section, in common law causes, the plaintiff is entitled, in the Circuit and District Courts, to similar remedies, by attachment or other process against the property of the defendant, as were then provided (June, 1872, 17 *U. S. Stat. at Large*, 197,) by the laws of the State in which those Courts were held, for the Courts thereof. It was further provided, that, from time to time, (in the future,) the Circuit and District Courts might, by general rules, adopt such State laws as might be in force in the States where they should be held, in respect to attachments and other process against the property of defendants. But it was provided that similar preliminary affidavits or proofs, and similar security to that required by the State laws, should be furnished by the party.

In addition to these provisions, which relate to attachments sued out in the United States Courts, there are special provisions as to attachments procured in the State Courts in causes afterwards removed into the Circuit Courts of the United States. Thus, section 646 of the Revised Statutes provides, that "any attachment of the goods or estate of the defendant, by the original process, shall hold the same to answer the final judgment, in the same manner as, by the laws of such State, they would have been held to answer final judgment had it been rendered by the Court in which the suit was commenced." This section, the construction of the latter part of which is rendered difficult by the substitution of the word "State," probably, for "United States," is followed, in the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 471, *sec. 4*.) by the provision, "that, when any suit shall be removed from a State Court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant, had in such suit in the State Court, shall hold the goods or estate so attached or sequestered, to answer the final

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judgment or decree, in the same manner as, by law, they would have been held to answer final judgment or decree, had it been rendered by the Court in which such suit was commenced ; \* \* \* and all injunctions, orders, and other proceedings, had in such suit, prior to its removal, shall remain in full force and effect until dissolved or modified by the Court to which such suit shall be removed." Section 6 of the same Act likewise provides, that the Circuit Court shall, in all suits removed under the provisions of that Act, proceed therein as if the suit had been originally commenced in the Circuit Court, and the same proceedings had been taken in such suit, in said Circuit Court, as shall have been had therein in such State Court, prior to its removal. Taking all these provisions together, I think it plain, that it is the intention of the law making power, as disclosed by the direction for conformity, in respect to attachments in original suits, to the laws of the States, by the direction to proceed in removed suits as if they had been originally begun in the Circuit Court, and as if what had been done in the State Court had taken place in the Circuit Court, and by the other provisions which have been referred to, to secure, in each State, one method of procedure in all common law cases, and to attain that result by adopting in general the procedure of the State Courts in the respective States. If this view is not allowed to govern, then I fail to see how the clear indications of the legislative will in respect to attachments are to be carried out. If it does govern, then the practice and procedure of this Court is as well defined as that of the State Court, and can be applied in practice by the body of the profession, which has been bred up in the State practice as it now exists, and is, to a great degree, ignorant of that practice which preceded it. Of course, the distinction between law and equity is preserved, both in substance and in procedure, and the provisions of positive statutes of the United States are not invaded ; but, in the absence of such provisions, the State practice prevails.

Entertaining these views, I am of opinion that the plaintiff is entitled to proceed in the reference pending when the cause

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was removed, in accordance with the laws of New York in that behalf; and that the order asked for in that respect should be granted.

*Lucius E. Chittenden*, for the plaintiff.

*Francis N. Bangs*, for the defendants.

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CHARLES P. WARNER

*vs.*

THE PENNSYLVANIA RAILROAD COMPANY.

A suit in a State Court, which falls within the description of suits removable into this Court, may be removed, although it could not originally have been brought in this Court.

That principle is not changed by the provision of section 5 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 472,) which provides for the dismissal or remanding by this Court of suits not really and substantially involving a dispute or controversy within the jurisdiction of this Court.

Under § 3 of said Act of 1875, which provides that a suit cannot be removed unless the application for removal is made before or at the term at which the cause could be first tried, if the term at which the cause could otherwise be first tried is one which occurs during the time a trial of the cause is stayed by an order of the State Court, it is not such a term as is meant by the statute.

(Before JOHNSON, J., Southern District of New York, January 7th, 1876.)

JOHNSON, J. The plaintiff applies to have this cause remanded to the State Court, upon the ground that this Court has no jurisdiction, the defendant being a corporation created under the laws of Pennsylvania, and, therefore, not an inhabitant of this District, nor capable of being found therein, within

the meaning of section 1 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) But, this view assumes that the jurisdiction of the Court in respect to causes removed is limited in the same way, in respect to inhabitancy and being found in the District, as it is in respect to suits originally brought in the Court. It was, however, well settled, previous to the Act of 1875, above referred to, that these restrictions upon the jurisdiction, in respect to suits originally brought in the Court, did not apply to suits otherwise capable of being removed; and that a suit in a State Court, which fell within the description of removable causes, might be removed, although it could not originally have been brought in the Circuit Court. (*Barney v. Globe Bank*, 5 *Blatchf. C. C. R.*, 107; *Sayles v. N. West. Ins. Co.*, 2 *Curtis' C. C. R.*, 212.) It is now urged, that section 5 of the same Act has introduced a different rule. That section provides, that, if a suit commenced in a Circuit Court, or removed there from a State Court, afterwards appears not to involve really and substantially a dispute or controversy within the jurisdiction of said Circuit Court, or that the parties to the suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the Act, the Court shall dismiss it, or remand it to the State Court. All that is necessary to bring the case really and substantially within the jurisdiction is, that it involves a controversy of the character, either as to the subject-matter or the parties, specified in either the section which defines the jurisdiction by original suit, or that which authorizes removal and the acquisition of jurisdiction in that manner.

In this case, the controversy is between citizens of different States, and was pending in the State Court within this District. It is true, that the defendant could not have been originally proceeded against in this Court; but it has, upon its own motion, come into this Court, and has thus placed itself in a position where it could not question its jurisdiction, even if it desired to do so. (*Bushnell v. Kennedy*, 9 *Wallace*, 387,

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393, 394.) It comes here, not as originally subject to the compulsory jurisdiction of this Court, but as entitled to the privilege of a resort to its authority, under the statute referred to.

Another point is suggested as ground for the motion, and that is, that the application to remove was made too late. It was decided in *The Merchants' & Manufacturers' Bank v. Wheeler*, (*ante p.* 218,) that the phrase of section 3 of the Act of March 3d, 1875, fixing the time when the application to remove must be made, "the term at which said cause could be first tried," must be construed to mean a term after the law mentioned took effect. In this case, therefore, such a term was one occurring after the 3d of March, 1875. At that time, it appears by the record that a stay of proceedings in the cause existed, upon an order requiring the plaintiff to file security for costs, which had been granted before the Act in question became a law. On the 30th of March, in an order for a commission for the examination of witnesses, the trial of the cause was stayed until the return of the commission. This stay continued until after the petition for removal was presented. The question, therefore, in this regard, is, whether, where a trial is stayed by order of the Court, a term occurring during such stay can be said to be, within the meaning of the statute, a term at which the trial could be had. When no legal obstacle to a trial exists at a particular term, it may be said that the trial could be had at that term, although, in point of fact, the state of the business of the term may satisfy the Court that the particular cause will not be called for trial. But, if a legal obstacle exists to a trial at a particular term, it is difficult to see in what just sense it can be said that the trial could be had at that term. The general purpose of the statute is to require diligence in making the application to remove. It must be made before the trial, and before or at the earliest term at which a trial could be had. But, if, by reason of a stay of proceedings, or for any other cause, the case could not be brought to trial at a particular term, even if it were the only case pending, then that is not such a term as is described

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in the statute. The application to remove, in this case, was, therefore, made in time, having been made before or at the term at which the cause could be first tried, occurring after the passage of the statute.

The motion to remand must be denied.

*Dennis McMahon*, for the plaintiff.

*Charles F. Sanford*, for the defendants.

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J. C. FRESE AND CO. *vs.* EDWARD BACHOF. IN EQUITY.

The plaintiffs had a right to use, as a trade-mark, in connection with packages of a medical preparation put up and sold by them, and known as "Hamburg tea," the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," in an oval. The defendant had, at one time, sold his article of Hamburg tea in packages, with a label containing the name of "J. C. Frese & Co." Although he claimed to have discontinued the use of such label: *Held*, that he had rendered himself liable to an injunction in that respect.

The plaintiffs also made a claim to the color of the wrappers and notices and directions tied up with the wrappers, and also to the general size and appearance of the packages in which they had been accustomed to sell their Hamburg tea, independently of such trade-mark or label. The defendant's packages were of the same size and general shape as those of the plaintiffs, and the color of the envelopes and of the printed notices and directions for use, tied up with the envelopes, was nearly the same; but the labels on the plaintiffs' packages contained, in a plain round label, the words "J. C. Frese & Co.," and, embossed in an oval, on an oblong white label, the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," while the defendant's labels contained, in a round white label, the name "Ed. Bachof & Co.," and, on an oblong white label, embossed in an oval, "Ed. Bachof & Co., No. 39, Hamburg:" *Held*, that, on this branch of the case, a preliminary injunction must be refused.

(Before JOHNSON, J., Southern District of New York, January 10th, 1876.)

JOHNSON, J. The plaintiffs have been, for a long time, ac-



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customed to put up and sell a medical preparation known as "Hamburg tea," and have used, in connection with it, as a trade-mark, the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," in an oval, applying it more commonly on a white label, in raised characters. I consider that their right to the use of this trade-mark, to distinguish the Hamburg tea sold by them, is established. It is shown that the defendant did, at one time, sell his article of Hamburg tea in packages, with a label containing the name of "J. C. Frese & Co.," and also with another white label bearing a strong general resemblance to the white label of the plaintiffs. Although he claims to have discontinued the use of these labels, he has, nevertheless, rendered himself liable to an injunction in that respect.

The plaintiffs, however, present a larger claim. This is to the color of the wrappers and notices and directions tied up with the wrappers, and also to the general size and appearance of the packages in which they have been accustomed to sell their Hamburg tea, independent of the trade-mark or label which has been already spoken of. The defendant's packets are of the same size as those of the plaintiffs; but this is because the quantity is what a purchaser usually desires. The general shape is the same; but this arises from the physical properties of the compound, which would most readily take that shape in being tied up for sale. The color of the envelopes, and of the printed notices and directions for use, tied up with the envelopes, is nearly the same, and might mislead, but for the printed or stamped label. Those on the plaintiffs' packets contain, in a plain round label, the words "J. C. Frese & Co.," and, embossed in an oval, on an oblong white label, the words "J. C. Frese & Co., Hopfensack, 6, Hamburg." The defendant's labels, with equal distinctness, contain, in a round white label, the name "Ed. Bachof & Co.," and on an oblong white label, embossed in an oval, "Ed. Bachof & Co., No. 39, Hamburg." I am by no means clear, that, as the case stands, the plaintiffs have made out any appropriation to their own exclusive use of the colored wrappers and form of packages employed. On the contrary, in these particulars, I am inclined,

upon the proofs, to the conclusion that both plaintiffs and defendant have employed the common method used in Germany for putting up medicinal teas. Nor do I find, nor have I been referred to, any case, in which, on such resemblances alone, apart from names or labels containing imitative matter, it has been held that an injunction would lie. These questions, however, it is not necessary, in this stage of the cause, to decide. To a preliminary injunction the plaintiffs are not, on this branch of the case, entitled. Neither party has any exclusive right in the article known as Hamburg tea, which appears to be a compound known in the German books of medicine; nor do the plaintiffs at present appear to have any special right in respect to the form, size and color of the packages, the labels upon which are sufficient to distinguish, even to a careless observer, the one from the other.

A preliminary injunction must issue against the defendant, restraining him from the use of the name of "J. C. Frese & Co.," and from that of the trade-mark, or label, "J. C. Frese & Co., Hopfensack, 6, Hamburg," on packages of Hamburg tea, and the residue of the injunction asked for is denied.

*Arthur V. Briesen*, for the plaintiffs.

*Edwin M. Wight*, for the defendant.

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Kent v. The Dawson Bank.

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## ELMORE A. KENT vs. THE DAWSON BANK.

A bank in Illinois, owning a draft drawn on one W., in Washington, North Carolina, transmitted it by mail to a bank at Wilmington, North Carolina, with directions to collect and remit the returns. W. resided 170 miles from Wilmington. The Wilmington bank credited the draft to the Illinois bank, and entered it for collection, and so advised the latter by a letter mailed at Wilmington, and then sent the draft to B., a banker at Washington, who was its correspondent and collecting agent there. B. collected the draft, but failed before remitting the amount to the Wilmington bank, although in good credit when the draft was sent to him. In a suit brought by the assignee of the Illinois bank against the Wilmington bank, to recover the amount of the draft: *Held*, that the plaintiff was entitled to recover.

The contract of the defendant was made in North Carolina, and to be wholly executed there, and was not governed by the law of Illinois, but by that of North Carolina.

The question of the liability of the defendant for the default of B. is an open one, so far as any statute or judicial decision in North Carolina is concerned, to be determined by the general principles of commercial law.

An undertaking to "collect" is not merely an undertaking to select a suitable agent, and transmit the paper to him to collect as agent for the owner, but is an undertaking to respond for any default of the agent selected.

(Before WALLACE, J., Southern District of New York, January 13th, 1876.)

WALLACE, J. The plaintiff, as assignee of the Corn Exchange National Bank, of Chicago, Illinois, brings this action to recover of the defendant the amount of a draft sent to the defendant for collection. A draft drawn upon one Wiswall, of Washington, North Carolina, and owned by the Corn Exchange National Bank, was transmitted by mail by the latter to the defendant, at Wilmington, North Carolina, with directions to collect and remit the returns. The residence of the drawee was distant from the defendant's place of business 170 miles. Upon receipt of the letter from the Corn Exchange National Bank, the defendant replied, stating, in substance, that the draft had been credited to the Corn Exchange National Bank and entered for collection; and thereupon the defendant transmitted the draft to Burbank & Gallagher,

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bankers at Washington, N. C., who were the correspondents and collecting agents of the defendant at that place. Burbank & Gallagher collected the draft, but failed before remitting the amount to the defendant, and the proceeds passed to their assignees in bankruptcy. They were in good credit at the time the draft was forwarded to them by the defendant.

Two questions arise upon these facts: *first*—are the rights of the parties to be determined by the law of Illinois or by that of North Carolina? *second*—is the defendant liable for the default of Burbank & Gallagher, on the theory that they were its agents and it was responsible for their miscarriage, or, is it exonerated, on the theory that its duty towards the Corn Exchange National Bank was discharged upon transmitting the draft, with proper directions, to competent and responsible agents at the drawee's place of residence?

If the rights of the parties are to be governed by the law of Illinois, the plaintiff cannot recover, as the adjudications of the highest Court of that State settle the question involved in favor of the defendant. (*Fay v. Strawn*, 32 *Illinois*, 295; *Ætna Ins. Co. v. Alton City Bank*, 25 *Id.*, 243.) It is urged, for the defendant, that the contract between the parties originated by the letter enclosing the draft mailed at Chicago, and was not complete until the Corn Exchange National Bank received the letter of the defendant in reply, acknowledging the receipt of the draft and assuming to undertake its collection, and was, therefore, wholly made in the State of Illinois. The sufficient answer to this position is, that the proposition of the Corn Exchange National Bank to the defendant, expressed by the letter of the latter, was assented to at the place where the defendant mailed its letter in reply, and then became obligatory upon the parties. Irrespective of this test, the contract was one which was to be wholly executed in the State of North Carolina. The place of performance of a contract is generally a controlling consideration by which to determine the *lex loci contractus*, and where, as here, the contract was both made in North Carolina and was to be performed there, it is clear that the case must be controlled by the law of that State. It

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is not claimed that any statute exists in the State of North Carolina which affects the rights of the parties, or that the Courts of that State have passed upon the direct question here, but the testimony of experts, lawyers of that State, has been produced, by which it appears, that the question is yet an open one, to be determined by the general principles of commercial law, as recognized by that State in common with the other States of the Union. The question, then, is, whether, upon the facts, the bank receiving the paper becomes the agent of the owner to make collection, and is liable for any miscarriage on the part of the agent to whom it delegates that duty, or whether it becomes the agent of the owner to transmit the paper, with proper instructions, to another, to collect it as an agent for the owner, and is liable only for negligence in the selection of the agent; and this is to be determined by this Court according to its own convictions, in the light of precedent and principle.

In the decisions of questions of commercial law, the Federal Courts do not feel bound to adhere to the course of adjudications in the Courts of the State in which the action is tried. It is to be regretted that a uniform rule should not have been adopted by the Courts upon a question of such importance, and one that so frequently arises; but it will be seen that it is involved in a hopeless conflict of authorities. In New York and Ohio, and in England, the adjudications are, that the receiving bank is the agent of the owner to make collection, and liable for the default of the sub-agent to which it transmits the paper, (*Allen v. Merchants' Bank*, 22 Wend., 215; *Montgomery Co. Bank v. Albany City Bank*, 3 Seld., 463; *Reeves v. State Bank*, 8 Ohio St., 465; *Van Wart v. Woolley*, 3 Barn. & Cress., 439; *Mackersy v. Ramsays*, 9 Clarke & Fin., 818;) while, in Connecticut, Massachusetts, Pennsylvania, and Illinois, the contrary doctrine is asserted, (*East Haddam Bank v. Scovil*, 12 Conn., 303; *Fabens v. Mercantile Bank*, 23 Pick., 330; *Dorchester & Milton Bank v. New England Bank*, 1 Cush., 172; *Mechanics' Bank v. Earp*, 4 Rawle, 384; *Ætna Ins. Co. v. Alton City Bank*, 25 Illinois, 243; *Fay v. Strawn*,

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32 *Id.*, 295.) No decision upon the question, of which I am aware, has been made by the Courts of the United States, though the case of *The Bank of Washington v. Triplett*, (1 *Peters*, 25,) is referred to in several of the decisions as one in point; but that case differs essentially from this, because, there, it was conceded that the draft was sent to the receiving bank to be by it transmitted to a sub-agent for collection, and the action was brought by the owner of the draft against the sub-agent. In many of the cases referred to, the liability of the receiving bank was predicated upon the theory that the sub-agent was its agent, and not the agent of the owner of the paper, while, in others, liability was denied upon the theory that the sub-agent was the agent of the owner. Accordingly, the same conflict of adjudication exists where the question has arisen whether the owner of the paper can maintain an action against the sub-agent for the latter's default in making collection, or whether his only remedy is against the receiving bank by whom the paper is transmitted to the sub-agent, (*Montgomery Co. Bank v. Albany City Bank*, 3 *Seld.*, 463; *Commercial Bank of Penn. v. Union Bank*, 11 *N. Y.*, 203;) while, in some of the cases, the conclusion is reached that the owner has his election to proceed against either, (*Wilson v. Smith*, 3 *How.*, 763.) In this confusion of precedent, and in the absence of any decision which should be held controlling upon this Court, it only remains for me to adopt such a conclusion as to my judgment seems best to accord with principle; and, in view of the very elaborate discussion of the question involved, to be found in several of the cases cited, I do not deem it necessary to do more than indicate some of the reasons which lead me to dissent from the doctrine that the receiving bank is exonerated from liability if it transmits the paper with proper instructions to a suitable agent. The cases which exonerate the bank from liability under such circumstances, rest their conclusions upon the supposed intention of the parties to the transaction, and insist, that, when the paper is to be collected at a place distant from the bank to which it is sent, the fair presumption is, that the parties do not intend that the

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receiving bank shall collect by its own officers or employees, but shall transmit to another agent to perform that duty. The first objection to this position is, that it is inconclusive, because it fails to determine the vital question, whether it is to be presumed the parties intend that the ultimate agent shall be the agent of the receiving bank or the agent of the owner of the paper; and the doubt thus presented has found expression not only in the cases cited, but in others, where the question was, whether the bank is liable for the default of a notary to whom it delivers paper to protest. (*Ayrault v. Pacific Bank*, 47 *N. Y.*, 570; *Citizens' Bank v. Howell*, 8 *Md.*, 530; *Bowling v. Arthur*, 34 *Mississippi*, 41; *Agricultural Bank v. Commercial Bank*, 15 *Id.*, 592.) The second objection is, that this presumption cannot be indulged without violence to the terms by which the parties have defined the character of the act to be performed. The owner sends the paper with instructions to collect it, and the receiving bank assumes to act upon these instructions. The undertaking, then, would seem to be one to collect, in the sense in which that term is used when applied to a bank or financial agent, rather than an undertaking to select a suitable agent for the owner. Some effect must be given to the language of the instructions. If it is intended that the receiving bank shall select an agent for the owner, it would seem that the instructions would naturally direct the bank to forward the paper for collection. The implication contended for requires the interpolation of other language into the instructions than that used. That which seems to me the reasonable one is in harmony with the language of the parties, while it is no more repugnant to the presumptions raised by the situation of the parties and the instrumentalities the undertaking may require. If the facts imply an undertaking on the part of the receiving bank to collect the paper, rather than one to transmit it to another to collect it as an agent for the owner, I can see no reason why the receiving bank should not be liable to the same extent as it would be if one of its immediate employees received and appropriated the money. The difficulty is in fixing the character of the undertaking. I know

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of no exception to the rule, that, when one, as principal, contracts to fulfil a duty towards another, he is liable for any default, whether on his own part or that of those to whom he delegates the duty. The cases where a bailee is not liable for the miscarriage of his agents or servants are not exceptions to the general rule, for, there, the implied contract is only to exercise ordinary care, and if, in selecting the agents, this duty has been fulfilled, the implied contract is satisfied.

For these reasons, I am of opinion that judgment should be rendered for the plaintiff, and it is ordered accordingly.

*Arthur, Phelps, Knevals & Ransom*, for the plaintiff.

*Scudder & Carter*, for the defendant.

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MARGARET MYERS, EXECUTRIX, &C.,

vs.

WILLIAM P. TYSON AND MARTIN MURPHY.

Under section 967 of the Revised Statutes of the United States, which provides, that "judgments and decrees rendered in a Circuit or District Court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the Courts of such State cease, by law, to be liens thereon," the Courts of the United States, in the State of New York, are not vested with the discretionary power which the State Courts of New York have, under section 282 of the Code of Procedure of New York, to order real property bound by the lien of a judgment to be exempted from such lien, in certain cases, during the pendency of an appeal from such judgment.

(Before JOHNSON, J., Southern District of New York, January 15th, 1876.)



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JOHNSON, J. This is an application for an order to suspend the lien of a decree of this Court in equity upon all the real estate of the defendant Tyson. It is founded upon the claim, that the provision of the New York Code (*section* 282) applies, by force of the statute presently to be mentioned, to the lien of the judgment in question. If that claim is well founded, then it would rest in the discretion of the Court, in view of all the facts, to grant or deny the order asked for. Section 967 of the Revised Statutes of the United States is as follows: "Judgments and decrees rendered in a Circuit or District Court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the Courts of such States cease, by law, to be liens thereon." This section is a re-enactment of part of section 4 of the Act of July 4th, 1840, (5 *U. S. Stat. at Large*, 393,) and which differs from it only by the word "now," and reads "now cease, by law, to be liens thereon." The State law, as it existed in 1840, was that, therefore, which was adopted by the statute of the United States of that year. At that time, no statute of New York gave to a party a right, on giving security on appeal, to apply for a suspension of the lien of a judgment against him. That right was given by an Act of 1851, for the first time, which made it discretionary with the Court to suspend the lien. The phrase of the Act of 1840, re-enacted in section 967 of the Revised Statutes, was not intended to cover such a case, so far as this State is concerned, when it was adopted. Nor does it appear to me that the alteration of the statute, by re-enacting it, omitting the word "now," has the effect of introducing into the law of the United States, in this State, this particular provision. The lien, according to the section of the Code before referred to, is suspended during the appeal, but does not cease. It is suspended not by law, but by the discretion of the Court. The words "by law," in section 967, are emphatic, and refer, in my judgment, to a fixed rule in respect to time and manner, and not to a discretionary power vested by statute in a State Court. The section of the Code, (*section* 282,)

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is: "Whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, the Court in which such judgment was recovered may, on special motion, after notice to the person owning such judgment, or to his attorney, and to the sureties to such undertaking, on such terms as such Court shall see fit, by order, exempt from the lien of such judgment the whole of the real property upon which said judgment is a lien, or a specific portion thereof, to be described in such order, and direct an entry to be made by the clerk on the docket of such judgment, that the same is 'secured on appeal,' except that in case only a specific portion of such property is exempted from such lien, such order shall direct an entry to be made on such docket, that the same is 'secured on appeal, as per order of the Court, dated —,' specifying the date of such order, and thereupon such judgment shall cease, during the pendency of such appeal, to be a lien upon the property so exempted, as against purchasers and mortgagees in good faith." This vests a discretionary power in the State Court to order the whole or a part of the real property bound by a judgment, to be exempted from its lien during the pendency of the appeal, in favor of purchasers and mortgagees in good faith. It does not, in my opinion, come within the meaning of section 967 of the Revised Statutes, and the Courts of the United States do not, under that section, take, in this State, the discretionary power conferred upon the State Courts in respect to their own judgments.

The motion must be denied.

*Frederic H. Betts*, for the plaintiff.

*Samuel J. Glassey*, for the defendant.

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Miller v. The Town of Berlin.

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JOHN MILLER *vs.* THE TOWN OF BERLIN.

A statute of New York which authorized a town to loan its credit in aid of a railroad corporation, by issuing its bonds, prohibited the making of the loan except on the condition that the written consent of a majority of the taxpayers, representing a majority of the taxable property of the town, should first be duly acknowledged and recorded, together with a copy of the assessment roll of the town, in the office of the county clerk, and it made such record evidence, in any Court, of the facts therein recited. The requisite number of consents were not obtained, and no consents were recorded in the clerk's office. Coupon bonds were, nevertheless, issued by commissioners specially charged by the statute with that duty, and the bonds recited that they were issued pursuant to law. In a suit against the town, to recover the amount of unpaid coupons, which, with the bonds with which they were issued, were purchased by the plaintiff's assignor, in good faith, before such coupons matured: *Held*,

- (1.) That the plaintiff need not prove that the bonds were issued in compliance with the conditions and limitations imposed by the statute.
- (2.) That the right to recover could not be defeated by proof that such conditions and limitations were not complied with.

When a municipal corporation has power, under any circumstances, to issue negotiable securities, a *bona fide* holder of them has a right to presume that they were issued under the circumstances which gave the requisite authority.

A *bona fide* purchaser of such bonds is not bound to look further, when they, on their face, import a compliance with the law under which they were issued.

There is no distinction, in this respect, between bonds issued by officers of the municipality having general powers to represent it in its fiscal transactions, and bonds issued by officers acting under a special power in the particular transaction.

(Before WALLACE, J., Northern District of New York, January 18th, 1876.)

WALLACE, J. The bonds to which the coupons in suit were originally annexed were issued in flagrant disregard of the rights of the defendant, by the commissioners who were specially charged with the protection of those rights. The Act which permitted the town of Berlin to loan its credit in aid of the Lebanon Springs Railroad Company was framed with great care, to prevent the very contingency which has

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taken place. It was therein provided, that it should be lawful for the commissioners to borrow, on the faith and credit of the town, such sum of money as a majority of the taxpayers representing a majority of the taxable property of the town should fix in writing, and it prohibited the exercise of this power except upon the condition that such consent should first be duly acknowledged and recorded, together with a copy of the assessment roll of the town, in the office of the clerk of the county, and it made this record evidence, in any Court, of the facts therein recited. These provisions clearly indicate the intent of the statute, that the power to pledge the faith of the municipality should not be executed by the commissioners until, as a precedent condition, the consents of the requisite number of taxpayers had been obtained, and the evidence thereof perpetuated, so that any person interested could ascertain, and prove or disprove, the existence of the condition, in any Court of justice. The existence or non-existence of the condition could be determined by a simple mathematical calculation, and the duty of the commissioners to issue, or to refuse to issue, the bonds was made as patent to the world as to the commissioners themselves. These provisions would seem to exclude any implication that the commissioners were to be the sole judges whether or not the facts existed upon which their authority was made to depend. It is conceded, that the requisite number of consents were not obtained, and no consents were recorded in the clerk's office. The inspection of the records of the clerk's office, by the person to whom the bonds were offered for sale, would have shown that the commissioners were attempting to bind the municipality in utter defiance of the conditions upon which they were to exercise their authority. If the liability of a municipal corporation upon bonds issued by its officers is to be tested by the ordinary rules of law applicable to negotiable paper executed by an agent, it would not require argument to show that the defendant is not liable upon the bonds in question. The bonds, having been issued by agents acting under a special power, would not be the obligations of the corporation, unless they

were issued within the limitations and conditions imposed upon the exercise of the power, and it would devolve upon a purchaser to ascertain whether or not the agents were acting within the terms of their authority. A purchaser of negotiable paper which purports to be executed by an agent, cannot recover without proof that the person who assumes to be the agent is, in fact, the agent of the principal, or has been held out by the principal as an agent. Where, as in this case, the authority of the agent is to be found in an Act of the Legislature, those who deal with the agent are bound to know the extent and nature of the authority; and where the existence of facts which limit or control the scope of the authority are as much within the means of knowledge of third persons as within that of the agent, it is incumbent upon all who deal with the agent to ascertain whether the facts exist; and the representations of the agent, in such case, will not estop the principal.

But, the adjudications of the Supreme Court of the United States have invested municipal bonds, issued by the officers of the municipality, with anomalous and peculiar immunities, and it is now too late to apply the ordinary doctrines of the law of commercial paper as the test of the rights and liabilities of the parties to such instruments. (*Bissell v. Jeffersonville*, 24 How., 287; *Moran v. Miami Co.*, 2 Black, 722; *Woods v. Lawrence Co.*, 1 Black, 386; *Mercer Co. v. Hackett*, 1 Wall., 83; *Gelpcke v. Dubuque, Id.*, 175; *Meyer v. Muscatine, Id.*, 384; *Lexington v. Butler*, 14 Wall., 282; *Grand Chute v. Winegar*, 15 Wall., 355; *St. Joseph v. Rogers*, 16 Wall., 644.) These adjudications establish two propositions, which must control this case. The first of the propositions applicable here may be stated in the language of Mr. Justice Swayne, (1 Wall., 203:) "When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority." This language is reiterated by Mr. Justice Clifford, in *City of Lexington v. Butler*, (14 Wall., 296.) The second of these

propositions applicable here is that which determines what constitutes a purchaser of such bonds a *bona fide* holder, and may be stated in the language of Mr. Justice Grier, (*Mercer Co. v. Hackett*, 1 Wall., 93,) as follows: "We have decided, that, where the bonds, on their face, import a compliance with the law under which they were issued, the purchaser is not bound to look further." Both of these propositions were enunciated in cases where the bonds had been issued by officers of the municipality having general power to represent it in its fiscal transactions, and might not necessarily be applicable where the bonds were issued by officers acting under a special power in the particular transaction. But, when it is remembered that the general doctrine has always been, that a municipal corporation is the creature of the law which creates it, and can make no contracts and do no acts except such as are permitted by its charter, and that its contracts must be executed, and its acts done, by such officers, and substantially in such manner, as the charter prescribes, it will be seen that all distinctions between the contracts and acts of officers of general authority, and those having only special powers, are immaterial. If a purchaser of negotiable paper executed by the officers of a municipal corporation is under no obligation to ascertain whether the officers are authorized to execute the paper in behalf of the corporation, it becomes entirely immaterial to ascertain whether they are acting under general or special powers. It is unnecessary to cite the various cases which sustain the foregoing propositions. It suffices to say, that they constitute an unbroken line of decisions, commencing with the case of *Knox Co. v. Aspinwall*, (21 How., 539,) and continuing to the latest expositions of the Supreme Court upon the subject. In many of the cases the statute under which the bonds were issued was construed to authorize the officers who issued them to determine whether there had been a compliance with the antecedent conditions prescribed before the power should be exercised. In these cases, it was clearly unnecessary to determine any other question, because, if the officers were to judge for themselves when the exercise

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of their authority was warranted by the facts, that determination could not be questioned collaterally, and, after the bonds were issued, would be conclusive evidence of the authority of the officers to bind the municipality, and any purchaser of the bonds could recover upon them, whether he was a *bona fide* holder or not, unless fraud or malfeasance on the part of the officers could be shown. As the propositions mentioned have been advanced uniformly in every case arising upon municipal bonds, they cannot be treated as *obiter*; and, certainly, they cannot be limited in their application to cases where it was unnecessary to apply them at all. It must follow, as a necessary deduction from the two propositions mentioned, that a purchaser of municipal bonds issued by the proper officers of a corporation which, by law, is permitted to lend its aid to a railroad, is entitled to recover when the bonds recite that they are issued pursuant to law, without proving that they were issued in compliance with the conditions and limitations imposed by law upon the transaction. If he is not required to look beyond the recitals when he purchases the bonds, he cannot be required, upon the trial, to produce any evidence of the truth of the recitals. If these justify his purchase, he cannot be defeated if they are disproved upon the trial, for, as against a *bona fide* purchaser of a negotiable security, no defences are known to the law, except that the defendant never made the instrument, or that it is void by positive statute. From these views it follows, that, inasmuch, as authority had been conferred by law upon the defendant to issue its bonds in aid of the railroad, and the commissioners were its officers for the express purpose of consummating this end, the plaintiff must recover, if he is an innocent holder of the bonds. That he is an innocent holder seems clear. It appears, that the bonds, with the coupons now in suit, were purchased before their maturity, by the German Savings Bank, in April, 1871. It does not appear whether or not any of the coupons past due were annexed to the bonds at the time of this purchase. If the past due coupons were purchased at the same time with those in suit, by the bank, I think its title as a *bona fide* pur-

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chaser of those thereafter to become due would not be invalidated by such fact. Each coupon, when severed from the bond, is a distinct obligation, and an independent instrument. Coupons are annexed to bonds in order that they may be severed and transferred by delivery, and thereby carry to the purchaser the interest which they represent. It is not necessary that the purchaser should produce upon the trial the bond to which the coupon was originally annexed, and the surrender or cancellation of the bond after the coupon has been transferred will not defeat the action. They possess all the attributes of commercial paper. (*Thomson v. Lee Co.*, 3 Wall., 327; *Aurora City v. West*, 7 Wall., 105; *Clark v. Iowa City*, 20 Wall., 589.) When the bank purchased these coupons, before they were due, and without notice of any defence to them, it became, *prima facie*, a *bona fide* holder of them, and the onus rests upon the defendant to show the existence of any other facts which deprive it of that character; and if, therefore, the purchase of overdue coupons at the same time would deprive it of that character, it was for the defendant to show the fact that such a purchase was made. If the bank was a *bona fide* purchaser, the plaintiff, who purchased of the bank, acquired all its rights.

These considerations lead to a denial of the motion for a new trial.

*Newcomb & Bailey*, for the plaintiff.

*R. A. & F. J. Parmenter*, for the defendant.



FREDERICK W. VON STADE *vs.* CHESTER A. ARTHUR.

In the tariff Acts, the article of bristles is separately classified, and is regarded as a different article from hair, and bristles are not included in the general words, "the hair of an animal."

(Before SHIPMAN, J., Southern District of New York, January 19th, 1876.)

SHIPMAN, J. The second section of the Act of June 6th, 1872, (17 *U. S. Stat. at Large*, 231,) provided, that, on and after August 1st, 1872, the existing duties upon the articles which are enumerated in the section should be reduced ten *per centum*. The section specifies, among the enumerated articles, "all wools, hair of the alpaca goat, and other animals, and all manufactures wholly or in part of wool, or hair of the alpaca and other like animals, except as hereinafter provided." The question in this case is, whether the duty of fifteen cents per pound upon hogs' bristles was reduced by virtue of the Act which has been cited.

Waiving the question, whether it was the intention of Congress to reduce the duty upon the hair of all animals, whether such hair was used or not in the manufacture of textile fabrics, I am of opinion, that, in the tariff Acts, the article of bristles is separately classified, and is regarded as a different article from hair. This will appear from the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 212,) which prescribes a duty upon bristles of fifteen cents per pound, and upon hogs' hair of one cent per pound. The language of the Revised Statutes of 1874, (*p.* 480,) is "Bristles, fifteen cents per pound;" "hair of hogs, one cent per pound." The term "bristles" is used in the tariff Acts to denote a separate and distinct article from hair, and the bristles are not included in the general words "the hair of an animal," but have a distinct classification.

Let judgment be entered for the defendant.

*Edward Hartley*, for the plaintiff.

*George Bliss*, (*District Attorney*), for the defendant.

## THE UNITED STATES, PLAINTIFFS IN ERROR

vs.

DAVID S. WOOD AND OTHERS, DEFENDANTS IN ERROR.

On the trial of a civil action by the United States against the sureties on the official bond of an assistant paymaster in the army, it is erroneous to allow evidence to be given by the defendants of the general conduct of the officer in the discharge of his official duties, and of his mode of life and pecuniary circumstances, even though he is dead.

(Before WALLACE, J., Northern District of New York, January 20th, 1876.)

THIS was an action against the sureties on the official bond of one Scholefield, an assistant paymaster in the army, brought in the District Court. At the trial, there was a verdict for the defendants, and the United States brought the case into this Court by a writ of error.

*Richard Crowley*, (*District Attorney*), for the plaintiffs in error.

*Conkling, Lord & Coxe*, for the defendants in error.

WALLACE, J., (after disposing of sundry exceptions.) The remaining exceptions in the case involve the question, whether it was error to permit the defendants to give evidence of Scholefield's general conduct in the discharge of his official duties, and of his mode of life and pecuniary circumstances. It is not surprising that the peculiar hardship of the position of the defendants upon the trial induced the learned judge who presided to give them the benefit of any doubts that might arise upon questions of evidence. Scholefield died in 1869, and it appeared inferentially that he was never aware

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that he had been charged with the \$10,000 in dispute. After his death, many of the papers were lost or destroyed, and the person who had been his clerk while assistant paymaster died while prosecuting an examination into the matters in controversy. Hodge had been convicted as a defaulter for a large amount, and was in prison under his sentence, and no assistance from him could be reasonably expected. The defendants were, therefore, deprived to a great extent of means of defence, and, as they were strangers to the transaction involved, their situation appealed strongly to the Court, and justified the utmost liberality in the application of the rules of evidence to their defence. These considerations, while they might and justly should influence the determination of doubtful questions upon the trial, cannot be permitted to prevail over convictions which are arrived at upon a deliberate review of the case.

I am constrained to hold that the evidence excepted to was erroneously received. In criminal cases it is always competent to permit the accused to give evidence of general good character. But, in such cases, where the offence is clearly proved, it is incumbent on the Court to instruct the jury that such evidence is not entitled to great consideration. In civil actions, the authorities are adverse to permitting such evidence, irrespective of the nature of the action. In the case of *Ruan v. Perry*, (3 *Caines*, 120,) it was held to be admissible in actions where the party offering it is charged with fraud or a tort involving moral turpitude, and this doctrine has been quoted approvingly by other authorities, when limited to cases where the wrongful act complained of is established by circumstantial evidence or by the testimony of witnesses of doubtful character, (*Townsend v. Graves*, 3 *Paige*, 455, 456;) but the later decisions in the same State repudiate it and adopt the rule in England, that the evidence is only admissible in a direct prosecution for a crime. (*Fowler v. Aetna Fire Ins. Co.*, 6 *Cow.*, 675; *Gough v. St. John*, 16 *Wend.*, 646.) Upon the trial of an information for keeping false weights it was excluded, (*Attorney General v. Bowman*, 2 *B. & P.*, 532, *note*;) also, in an action for divorce, (*Humphrey v. Humphrey*,

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7 Conn., 116.) Nor does the fact that the person is dead whose fraudulent or wrongful act is the subject of the action permit any relaxation of the rule, (*Anderson v. Long*, 10 Serg. & Rawle, 55; *Nash v. Gilkeson*, 5 Id., 352;) and the reason for the rule is, that the evidence must apply to the particular fact in dispute, (*Givens v. Bradley*, 3 Bibb, 195,) or, as stated by Chief Justice Savage, "the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties." The evidence received in this case is more objectionable than that which I have referred to. Its effect was not to prove the general character of Major Scholefield, but his special characteristics as a paymaster. The effort was to prove the general manner in which he discharged his official duties. It was none the less incompetent because this evidence was given by those who spoke from personal observation of his conduct. However exemplary his conduct may have been, and however faithful and accurate the discharge of his general official duties, evidence of this could not throw any light upon the particular transaction involved. Numerous cases can be cited, where the issue was one involving negligence, which hold that proof of negligence or of care upon other occasions than the one which is the direct subject of investigation, cannot be permitted. (*Baker v. Savage*, 1 Sweeny, 288; *Warner v. N. Y. C. R. R. Co.*, 44 N.Y., 465.) As well might it be contended that it would be competent to show, in an action involving the question of usury or fraud or breach of contract, the general conduct of the person charged to be inconsistent with the particular transaction involved, as to assert it of the evidence admitted here. Even in criminal cases, where the vital inquiry was as to the conduct of the deceased at the time when he was killed, evidence to show what his usual conduct was under similar circumstances has been held incompetent. (*The State v. Thawley*, 4 Harrington, 562; *The State v. Barfield*, 8 Iredell, 344; *Jolly v. The State*, 13 Smedes & Marshall, 223.) The tendency of this evidence was inevitably to mislead the jury. Very many of the cases

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which I have cited were those where the admission of such testimony was held fatal to the verdict.

I do not deem it necessary to discuss the exceptions taken to other evidence received upon the trial. The judgment of the Court below must be reversed, and the cause remanded for a *venire de novo*.

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THE VIRGO.

On a libel *in rem*, in the District Court, against a vessel, the vessel was there discharged, on a stipulation for value. The libel was dismissed, and an appeal was taken by the libellant to this Court. Thereafter the stipulators for value became insolvent, and the libellant moved, in this Court, that the claimant file new security for value: *Held*, that the motion must be granted, and that the Court had the power to require the claimant to furnish new stipulators, and to enforce such requirement.

The effect of the appeal was to leave the libellant with the same rights in respect to stipulators as if no decree had been rendered.

The absence from the general Admiralty Rules of the Supreme Court, and from the Rules of this Court, of any provision for the case of insolvent stipulators in actions *in rem*, furnishes no reason for not affording the relief sought.

Part of the obligation which a claimant in an action *in rem* assumes when he receives at the hands of the Court property in its custody, by substituting therefor personal security, by way of a stipulation for value, is to maintain his stipulation good, in the matter of the sureties.

(Before BENEDICT, J., Eastern District of New York, February 19th, 1876.)

BENEDICT, J. This is a motion on the part of the libellant to compel the claimants to file new security for value, the stipulators who gave the stipulation for value in the District Court, upon which the vessel was there discharged, having become insolvent. In the District Court the libel was dismissed. From that decree an appeal has been regularly taken by the libellant, and the cause has been duly transferred to this Court, where it is now pending, upon appeal.

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The claimants do not deny the insolvency of the stipulators for value, but object to being required to furnish new stipulators, upon the ground, first, that, by the decree of the District Court, the libellant was found not entitled to recover any sum, which decree, it is said, absolves the claimants from liability, until reversed. But, such is not the effect of a decree made in the District Court, from which an appeal is duly taken. On the contrary, the appeal renders the decree inoperative, and leaves the libellant with the same right, in respect to stipulators as if no decree had been rendered.

It is also objected, that neither the Admiralty Rules of the Supreme Court, nor those of the Circuit Court, provide for the case of insolvency of stipulators for value, in actions *in rem*. As to this objection, I remark, that, although it be true that the Admiralty Rules of the Supreme Court appear to be confined to actions *in personam*, it is competent for the Court below to adopt Rules not in conflict with the general Admiralty Rules of the Supreme Court, in regard to matters not covered by those Rules. This has often been held, and, accordingly, the Rules of the District Court in this District, and also in the Southern District, have provided for the case of insolvency of stipulators in actions *in rem*. The absence from the general Admiralty Rules, of any provision for the case of insolvent stipulators in actions *in rem*, furnishes, therefore, no reason for not affording the relief here sought. Nor does the absence of any rule in the Circuit Court furnish such reason. The case has not been provided for in the Rules of the Circuit Court, doubtless, because cases requiring such a rule in the Circuit Court are so rare, the present being the first one which I have known of. But, in the absence of a rule, the Court has power to remedy the omission by order made in the cause.

Again, it is contended, that the stipulation for value given in the District Court upon the discharge of the vessel, becomes a substitute for the vessel, and the sole substitute, from which it is argued, that no power exists to require any other or additional security; and the absence of any provision in the

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Rules for cases *in rem* is referred to as indicating an absence of such power. But, while the stipulation for value is a substitute for the vessel, it is not the sole substitute, in such a sense as to forbid any change. If it were so, additional security could never be required when once the vessel is released; and yet the right to require additional sureties to the stipulation in the District Court is declared by the Rules of the Court. This power has been exercised without question where one stipulator has desired to be released and another substituted, in the District Court. This right has not been disputed in the District Court, and, if it exists at all after the release of the vessel, it exists as well after an appeal as before, and as well when the surety has become insolvent as when a new stipulator is desired to take the place of another. I doubt not, therefore, that it is proper to say that part of the obligation which claimants in actions *in rem* assume, when they receive at the hands of the Court property in the custody of the Court, by substituting therefor personal security, by way of a stipulation for value, is to maintain their stipulation good, in the matter of the sureties.

In the present case, therefore, the libellant has the right to ask the claimants to fulfil that obligation, by furnishing new stipulators in place of those conceded to be insolvent, and, in case of their failure so to do, to ask that their defence be stricken out, or the performance of their obligation be otherwise enforced.

*Scudder & Carter*, for the libellant.

*John Sherwood*, for the claimants.

## JOHN H. CHEEVER

vs.

## JAMES A. SHEDD AND OTHERS. IN EQUITY.

A street 50 feet in width was laid out by the proper authority through the land of C., and the damages to C. were assessed. Such damages included remuneration for the land taken, for the deprivation of any right or privilege attached to it, and for the damage done by the lay out to the land connected with that which was covered by the street. A street of 50 feet in width was a fit and proper width for the public necessities at the *locus in quo*, the grade was a proper grade, and too much earth was not excavated. But, the public officers charged with doing the work cut the land at the extreme sides of the street perpendicularly, in a manner which would cause the adjoining land of C. to cave into the street, and subject him to expense and damage. On a bill filed by C. to restrain such officers from excavating in such manner, on the ground that they were doing the work without reasonable care, because they were not either providing a proper slope in the 50 feet width, or building a retaining wall in such width at their own expense: *Held*, that they had the right to excavate in such manner.

In the absence of statutory provisions, a municipal corporation or its agents are not liable for the consequential damage which is necessarily done, in the exercise of reasonable care, to adjoining land not taken for public use, in the execution of a public work imposed by the Legislature upon the corporation, for the public benefit.

A municipal corporation may grade and change the grade of streets, from time to time, when it is necessary so to do, without protecting the earth or embankments of the adjoining proprietors, and is not liable for the consequential damage caused to them in adapting their land to the grade and protecting it.

(Before SHIPMAN, J., Vermont, February 28th, 1876.)

SHIPMAN, J. In the year 1872, a new highway, of fifty feet in width, was duly laid out and established in the city of Burlington, by the proper Court having jurisdiction over the subject, which highway said Court directed should be completed on or before October 15th, 1873. The highway is 1,175 feet in length, extending from College street to Pearl street, and is an extension of a previously existing street, called



Union street, so as to form a continuous street with Maiden lane, which last two named streets are also of fifty feet in width. The new street is within about fifty rods of the business centre of Burlington, a city of 18,000 inhabitants, and intersects two important streets, and will be considerably used for public travel. About                    feet in length and fifty feet in width of the land of John H. Cheever, the complainant, being a portion of a tract of several acres belonging to him, are taken for the street. The Court which directed the lay out, the complainant appearing, and being heard thereon, adjudged that he was "entitled to no land damages in consequence of laying out and establishing said highway, the benefit to said Cheever's premises, through which said highway is laid out, being a full compensation for the land taken for said highway." It is necessary that said street should have the usual sidewalks, curbs and gutters which are customary in city streets, and it is fit and proper for the full accommodation of the public travel, that the whole street, including roadway and sidewalks, should be of fifty feet in width. The natural surface of the plaintiff's land, and of the other land over which this street passes, is uneven, being traversed by ravines or hollows, and by knolls or bluffs, and it was necessary, in order properly to construct the street, and to make a proper grade, that the knolls should be cut through and that the hollows should be filled. The city street commissioners, who had, by statute, the care and superintendence of the highways in the city, and whose duty it was "to make and repair all highways," in order to put the street in a proper condition for public use and travel, established a grade, which grade required three cuts on the land taken from the plaintiff, one of 168 feet in length and  $10\frac{2}{10}$  feet in depth at the centre, one of 60 feet in length and  $2\frac{3}{10}$  feet in depth at the centre, the third of 61 feet in length and a centre depth of  $1\frac{8}{100}$  feet. The form of all the cuts was that of a knoll, sloping evenly each way. This grade is a proper one for the purposes of the street. All the earth which was taken from these cuts was used to fill the hollows in the street, but other earth could

have been hauled for the same purpose from a greater distance. The street commissioners, in making these cuttings, cut down intentionally the soil and turf upon said street perpendicularly, or very nearly so, up to the extreme boundaries or lines of said street, and claimed and exercised the right to cut said highway perpendicularly up to the limits thereof. The soil is clay and quicksand, and the effect of the perpendicular excavation, unless the bank is protected, is, that the adjoining soil will slip, and be gradually sloughed off by the action of the rain and frost, until a slope has been formed sufficiently inclined to prevent further slipping. An unprotected perpendicular embankment of ten feet in height would be encroached upon, in two or three years, to an extent of five feet, before a proper slope was formed. This result has already commenced upon the land of the complainant. If the city authorities have no right to cause this incidental injury to the adjoining land, their proper course is to use only such a width as will leave a sufficient slope, or to use the entire width and build a retaining wall. If the complainant is remediless, he must grade his land in conformity with the street line, or build a retaining wall himself. A suitable retaining wall would cost \$500. Grading the land would probably be less expensive, and would be more advantageous to the owner of the land, in the event of any future disposition or sale of the property. The land of the complainant which has been taken for the street, is part of a large tract belonging to the complainant, used heretofore, with the buildings upon it, as a gentleman's mansion. Where the deep cut is made, the land is not ornamented with shrubbery and shade trees, as is the case with the portion adjacent to the house. The present suit is a bill for an injunction to restrain the defendants, who are the street commissioners and the superintendent of streets, from excavating in such a manner as to cause the injury to the adjacent land which has been mentioned. The superintendent has, by the city charter, the immediate care and supervision of the streets, and his duty is to see that they are properly constructed and kept in repair. After the bill was filed, a provisional injunction was granted,

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which is still in force. The bill proceeds upon the idea that the defendants are acting in the premises without reasonable care.

From the preceding statement, it will be seen, that the proper authority has directed the construction of a street of fifty feet in width, and has assessed the damages which will arise to the complainant from the taking of his land, which damages include all those which are immediately incident to and consequent upon the construction of the highway. An assessment of damages is for the direct and immediate damage resulting from the laying out of the highway. The owner is to be remunerated for the land taken, for the deprivation of "any right or privilege attached to it, and for the damage done by the lay out to the land connected with that which is covered by the highway, and of which it was a part." (*Clark v. Saybrook*, 21 Conn., 313.) When a part only of the land of the owner is taken for a public work, the damage which will necessarily result, from the use of the part which is taken, to the land which is not occupied by the public, is to be estimated. When the remaining land is separated by the new highway from outbuildings, or from a supply of water, or is left in unsalable condition, or unfit for occupancy, or is divided by high embankments which cause inconvenience, the effect of these and similar circumstances, and the effect which the appropriation will have in benefitting the remaining land, are to be taken into consideration in the estimate of damages. In the case of a new highway, the general grade which must be adopted, so as to conform to the existing grade of connecting streets, and so as to make a convenient highway, are obvious to the appraisers of damages, who inspect the premises and can see the injury and the special benefit which the opening of a highway must necessarily cause to the whole land. The presumption is, that the appraisal is for the value of the property taken and the damage which will specially result to the residue by such taking. But, it is truly said, that the appraisal assumes and presupposes that the highway is to be constructed with reasonable care, and if, "for want of reasonable

care and skill in the construction of such work, unnecessary damage is caused, it is not warranted by the right of eminent domain." (*Sprague v. Worcester*, 13 Gray, 195.) Consequential damages which result to the remaining land, from want of reasonable care in the construction of the highway, are not included in the estimate of damages. It is contended that this highway was not constructed with reasonable care, by reason of the fact that it was excavated upon the extreme limits of the land taken, so as to cause the adjoining land to be deprived of its lateral support, and so as to inflict an actionable injury.

In order to determine whether reasonable care has been taken, it becomes necessary to consider the powers which municipal corporations possess in regard to the construction of highways, and in regard to the grade, and the alterations in the grade, of streets, whereby a consequential injury is caused to adjoining land. The defendants are public officers, and the duty has been imposed upon them by the Legislature, of making and constructing highways in the city of Burlington. The law, while it imposes this duty upon public officers, also requires them to construct public works so as not wantonly or maliciously to injure adjoining proprietors, and so as to cause no unnecessary damage. They are not exempted from the obligation to use reasonable care. (*Mersey Dock Cases*, 11 *House of Lords Cases*, 713.) The work must be done in such a reasonable and proper manner as to cause no damage which is not necessarily incident to the prosecution of the work. Thus, municipal corporations are required to build highways over water-courses in such a manner as not unreasonably to set the water back upon adjoining proprietors. Although a strip of land of seventy-five feet in width should be condemned to be taken for a street, yet, if the whole width should be excavated so as to injure adjoining proprietors, when a strip of fifty feet would amply accommodate the public needs, and such damage was not necessarily incident to a reasonable performance of the public work, such an excavation would be an unreasonable exercise of power. If the public officer "should

abuse his authority, by digging down or raising up where it might not be necessary for the reasonable repair and amendment of the road, he would be amenable to any suffering party for his damages." (*Callender v. Marsh*, 1 *Pick.*, 418.) The public work should not be planned and should not be executed so as to inflict unnecessary damage; and, therefore, if a work is carried on in such a manner as unduly to injure the adjoining proprietor, the prosecution of such a work may be restrained by a Court of equity.

But, the principle seems also to have been established, that, in the absence of statutory provisions, a municipal corporation or its agents are not liable for the consequential damage which is necessarily done, in the exercise of reasonable care, to adjoining land not taken for public use, in the execution of a public work imposed by the Legislature upon the corporation, for the public benefit, although an individual who executes such an improvement upon his own land for his private benefit, might strictly be liable for such consequential injury. (*Sutton v. Clarke*, 6 *Taunt.*, 29; *Boulton v. Crowther*, 2 *B. & C.*, 703; *Mersey Dock Cases*, 11 *House of Lords Cases*, 713; *Smith v. Washington*, 20 *How.*, 135; *Radcliff v. Brooklyn*, 4 *Comst.*, 195; *Callender v. Marsh*, 1 *Pick.*, 418; *O'Connor v. Pittsburgh*, 18 *Pa. St.*, 187; *Hollister v. Union Co.*, 9 *Conn.*, 436; *Reynolds v. Shreveport*, 13 *La. Ann.*, 426; *Murphy v. Chicago*, 29 *Ill.*, 279; *Richardson v. Vt. Cent. R. R. Co.*, 25 *Vt.*, 474.) This doctrine is based upon the theory, that the act is done in the discharge of a duty which is imposed by the supreme power of the State upon the municipal corporation, and is done for the public benefit and not for private emolument. It is absolutely necessary for the public accommodation that streets should be raised and lowered. "Streets cannot be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or in other words, the road must be 'graded' or 'reduced to a certain degree of ascent or descent,' which is the proper definition of the verb 'to grade.' If the duty imposed

on the corporation requires this to be done, the power must be co-extensive with the duty." (*Smith v. Washington*, 20 How., 148.) This work, especially in a city, where population is crowded and land is valuable, will cause some damage to adjoining proprietors, and inflict hardship upon individuals. Such damage, when it has not been caused unnecessarily, is "*damnum absque injuria*," from the fact that the work which causes the damage is for the public benefit, and "private interests must yield to public accommodation. One cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of that of the public." (*Smith v. Washington*, cited *supra*.)

It is not intended that this principle should be considered as applicable to the acts of private corporations who are authorized by the Legislature to construct works of a public character, such as canals or railroads, for, although such corporations are empowered to take land, upon the ground that the taking is for the public use, and although the works are to be used by the public, yet they are constructed primarily for the benefit and emolument of the private corporations who have them in charge, and who are not public agents. (*Hooker v. N. H. & N. Co.*, 15 Conn., 312.)

In the application of these principles to the present case, it is to be observed, that it has been found that a street of fifty feet in width was a fit and proper width for the public necessities, at the place where the street was constructed, that the grade was a proper grade, and that, owing to the unevenness of the land, all the soil which was taken from the cuts was necessarily used to fill the hollows. The city was not, therefore, using an unnecessary or unreasonable quantity of land, or excavating too much earth. But, it is urged, with great force, that the defendants were not constructing the street with reasonable care, in this, that they were cutting the land at the extreme limits of the street perpendicularly, the inevitable effect of which method of construction is to cause the adjoining land to cave into the street, and to subject the owner to expense and

damage; that, if an individual or private corporation excavates in such a manner that the adjacent land is deprived of the lateral support of the soil, and of adequate protection, such private person or corporation inflicts thereby an actionable injury upon the adjoining proprietor, and that, if the city desired to use their entire fifty feet of land, when such use caused an injury to the complainant, they should prevent the injury by building, at their own expense, a retaining wall, and the neglect to provide a protection is a want of reasonable care.

While all the decisions admit the doctrine that a public work must be constructed with reasonable care, the question of the extent of authority which a municipal corporation can exercise in respect to the grade of streets, whereby a consequential damage is caused to adjoining land, has been frequently before the Courts. The strong weight of authority in this country is to the effect that such a corporation is authorized to grade and change the grade of streets from time to time, when it is necessary so to do, without protecting the earth or embankments of the adjoining proprietors, who are often subjected to expense in adapting their land to the grade, and in protecting their property from the consequential damage which is incident to the lowering of the street. The injury which is done to adjoining proprietors most frequently results from the changes of grade which become necessary, as a city increases in population and business, and the needs of the public become more urgent, but not unfrequently results from the original grade upon which the street is constructed. Necessary grades and changes of grade are constantly being made in our cities, under the power to construct and repair streets, with no protection of the adjoining soil, by the municipal authorities, and such exercise of authority has been, with some exceptions, sustained by the Courts of the different States. The justification has been upon the principle which has already been stated, viz., that a public officer is justified in inflicting consequential damage in the necessary prosecution of a public work imposed by the Legislature upon a municipal corporation and prosecuted for the public benefit. The leading authorities have already been cited.

It may be said, that nearly all of the decisions which have been quoted refer to the regrading, or alteration of the grade, of a street. But, if there is no duty upon a city to protect the landowners against the consequences of a new excavation which is made after the street has been constructed, and after it has been long used, it is difficult to see why another standard or rule should be imposed when the street is first made passable for the public, and is to be brought to a proper level.

Although I am impressed with the seeming injustice and hardship of a method of constructing and repairing streets which throws upon the individual proprietor, if he has not been compensated for this consequential injury, a burden which would be onerous for the corporation to bear, I am constrained by the decisions of Courts whose opinions are justly entitled to great weight, to hold, that a municipal corporation can properly construct and repair streets in this manner. It follows, that the defendants were constructing this street with the ordinary care which the law demands.

Let the bill be dismissed, without costs.

*Americus V. Spalding* and *Edward J. Phelps*, for the plaintiff.

*Romeo H. Start* and *Torrey E. Wales*, for the defendants.



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The United States v. Loughery.

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## THE UNITED STATES

vs.

JOHN S. LOUGHERY AND THOMAS LOUGHERY.

Section 746 of the Revised Statutes provides, that, when a trial has been commenced and is in progress before a jury or the Court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of the Court. On the trial of an indictment, after several jurors had been called and challenged, and three had been found competent and sworn, the Court, on the last day of the term, directed that the trial proceed on the following day, which was the first day of the succeeding term. It so proceeded, and, after a conviction, it was, on a motion in arrest of judgment, *Held*, that the trial had been commenced and was in progress, although a full jury was not empanelled before the term ended.

Section 804 of the Revised Statutes provides, that, when the panel is exhausted, the marshal, by the order of the Court, shall return jurymen from the bystanders, sufficient to complete the panel. Under such an order, the marshal summoned as jurymen persons who were not in the Court room, or about the Court house, when such order was made, or when they were summoned, but they were present in Court when they were returned by the marshal as present, and when their names were placed on the panel and their ballots placed in the wheel: *Held*, that they became bystanders, within the meaning of the statute, when they attended ;

*Held*, also, that such objection should have been taken as a ground of challenge to the array, before the polls were drawn, and that it was too late to challenge the array after challenging the polls.

If, after the trial of an indictment is commenced, the accused escapes from custody, and, for that reason, his further attendance cannot be had, the trial may proceed in his absence.

(Before BENEDICT, J., Eastern District of New York, March 8th, 1876.)

BENEDICT, J. The defendants were jointly indicted with one Lewinski for coining. All three were put upon trial together, at the November term. After several jurors had been called and challenged, and three had been found competent and sworn, the panel was found to be exhausted by reason of challenges. The hour being late, on the last day of the term,

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the Court, in pursuance of section 746 of the Revised Statutes, directed that the trial of the cause be continued on the following day, notwithstanding that such following day was the commencement of the December term. The Court also directed the marshal to summon talesmen to fill the panel. On the day following, the marshal returned the names of twenty-four persons as in Court ready to serve as talesmen. The names of those persons were then placed in the box, and from those ballots names were drawn to complete the jury. Those persons so drawn, as they were called to be sworn in the cause, were each challenged by the prisoners. Upon the trial of such challenge, it was proved, by the oath of each jurymen, that he was not in the Court room, or about the Court house, on the previous day, when the order for talesmen was made, but had been summoned by the marshal to attend, and, when so summoned, was not in the Court room or about the Court house. These challenges were overruled. Thereupon, after the full number of jurors had been sworn, the defendants claimed the right to challenge the array, and to prove by the marshal that the persons summoned by him, in pursuance of the order for talesmen, were not bystanders when so summoned. The challenge to the array was rejected, and the trial proceeded. After the evidence on the part of the Government was for the most part completed, and during the night, these two defendants broke jail and escaped from custody. Thereupon, their counsel objected to further proceedings upon the indictment, in the absence of the prisoners. The objection being overruled, the counsel for these defendants withdrew, and the trial proceeded. The jury thereafter found a verdict of guilty against all three accused, and the one still in custody was thereupon sentenced. Subsequently, the prisoners who had escaped were caught and brought into Court for sentence, whereupon this motion in arrest of judgment is made, upon the following grounds—first, that there was a mistrial, because the trial was not commenced before a jury or the Court at the November term, within the meaning of section 746 of the Revised Statutes, since but three jurymen had been sworn when the term

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ended, and there was, therefore, no power to continue the trial upon the subsequent day. A jury, it is said, consists of twelve men, and section 746 has no application to a case where a full jury is not impanelled before the term ends. The statute provides, that, when a trial has been commenced, and is in progress, before a jury or the Court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of the Court; and I am of the opinion that the trial of this cause was commenced and in progress at the November term, within the meaning of the statute. When a juryman is sworn in a cause, a trial is commenced—perhaps, when one juryman is drawn from the box. Here, several jurymen had been drawn, challenges had been taken and tried, and three jurymen had been accepted and sworn. Upon these challenges, questions of law had been raised, and objections taken, which formed part of the record. This trial was, therefore, in progress before either the Court or the jury, and, as I consider, was in progress before a jury, within the meaning and intent of the Act. It was, therefore, lawfully proceeded with, as if another stated term had not intervened.

The next ground upon which an arrest of judgment is asked, arises out of the challenges taken on the second day of the trial. The statute of the United States, section 804 of the Revised Statutes, directs, that, when the panel is exhausted, the marshal, by the order of the Court, shall return jurymen from the bystanders, sufficient to complete the panel. In this case, the point taken is, that the persons summoned by the marshal, in pursuance of the order of the Court, were not bystanders, because not in Court when summoned by the marshal. But, these persons were present in Court when they were returned by the marshal as present, and when their names were placed upon the panel, and their ballots placed in the wheel; and the statute is complied with, if the persons returned by the marshal are present in Court when so returned. How long they had been present, or how they happened to be present, is of no consequence, provided no fraud or collusion or improper action is suggested. At common law, the duty

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of selecting jurors belongs to the sheriff, and it would seriously embarrass trials if it were held that, when a panel fails by reason of challenges, and talesmen are ordered, the marshal is bound to return the talesmen from those who happen, at the instant of making the order, to be present in Court. There may be no bystanders then present, or all present may be unfit persons, or they may be persons whose presence has been secured by the accused in anticipation of a failure of the panel. "Persons, who are not bystanders in the Court, may be summoned as talesmen, for, when they come in, they are bystanders." (*Bac. Abr., Juries*, vol. 5, p. 337.) The statutes of 6 Geo. 4, c. 50, § 37, provided that tales be named by the sheriff of the "able men of the county *then present*." Under that statute it was held not to be necessary that the tales should be selected out of persons accidentally present, but that they might be selected out of persons whose presence the sheriff had taken previous measures to obtain. (*Bac. Abr., Juries*; see, also, *State v. Lamon*, 3 *Hawks*, 179.) I am, therefore, of the opinion, that it formed no valid ground of objection to the persons placed upon the panel on the second day of the trial, they being present in Court when returned by the marshal, and when their names were placed in the box, that, at the time they were notified by the marshal to be present in Court on that day, they were elsewhere than in the Court room or the Court house. Whether they could be compelled to attend is another question, but, when they did attend, they became bystanders, within the meaning of the statute.

It would seem further, that this objection was taken too late. The fact relied on, if of any effect, constituted a ground of challenge to the array, and the point should have been raised by challenging the array before any of the tales were drawn. (*Bac. Abr., Juries*, vol. 5, pp. 345, 352.) Here, the point was first taken as a ground of principal challenge to the polls. After a challenge to the polls it was too late to challenge the array.

The next ground relied upon is, that the accused were not

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present during the whole of the trial and when the verdict was rendered. But, the absence of the accused does not affect the proceedings, when it arises from the fact that, after the trial commenced, the accused escaped from custody, and his attendance cannot, for that reason, be had. The right of these defendants to be present during their trial was lost when they broke jail and escaped. Certainly, great inducements to escape during trial would be held out were it the law that, by an escape, further proceedings in a trial will be prevented. I see no reason for giving that effect to an escape, and I am furnished with no authority for the proposition.

The grounds for an arrest of judgment, which have been relied on, cannot, in my opinion, be upheld, and the motion is, accordingly, denied.

*Hubert G. Hull*, (*Assistant District Attorney*), for the United States.

*Isaac S. Catlin*, for the defendants.

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IN THE MATTER OF HORATIO N. ALLEN, ON HABEAS CORPUS.

An uncontested order, made by a register in bankruptcy, in Vermont, that a bankrupt produce certain books and papers relating to his business, was disobeyed by him. On proof thereof, and on service of notice on the bankrupt, the District Court for Vermont adjudged him to have been guilty of a contempt, and ordered that he deliver up the books and papers to the marshal, and pay the costs, and that, in default thereof, he be arrested by the marshal, or his deputy, and committed to jail to be safely kept until discharged by order of said Court. The deputy of the marshal demanded the books and papers and costs from the bankrupt, in New Hampshire, which he refused to deliver or pay, and then the deputy arrested him in New Hampshire, and committed him to jail in Vermont. On a *habeas corpus* sued out by the bankrupt: *Held*,

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- (1.) The order of the register was the order of the Court, and, when it was disobeyed, it was proper to institute proceedings for contempt directly on such disobedience;
- (2.) It was proper to direct that the bankrupt be committed until discharged by order of the District Court;
- (8.) The arrest in New Hampshire was illegal, and the imprisonment in Vermont, in pursuance of such arrest, was, therefore, illegal, although the warrant of arrest was valid.

(Before SHIPMAN, J., Vermont, March 16th, 1876.)

SHIPMAN, J. From the return of the jailer it appears, that the relator, Horatio N. Allen, is held in custody upon a warrant which issued from the District Court of the United States for the District of Vermont. The warrant or order of commitment recites, that the relator is a bankrupt, and was legally notified to appear, and did appear, before a register in bankruptcy, to submit to an examination under the provisions of the bankrupt Act; that said examination disclosed that Allen had kept entries of his business transactions upon "diaries," which diaries and other memoranda and papers relating to his business it was necessary should be in the possession of the assignee, in order that he might obtain a full knowledge of the property of the bankrupt; that the assignee demanded said papers and books from the bankrupt, and procured an order to be made by the register, commanding said Allen to produce said papers and books, which order he neglected to obey; that, thereupon, the assignee brought a petition before the District Court, praying that the bankrupt be proceeded against for contempt, and be ordered to surrender said books and papers to the petitioner; that an order was issued from the District Court to said Allen, directing him to show cause why he should not be dealt with for contempt, and should not surrender said papers; that said order to show cause was duly served, and, said petition having been continued from time to time, at the request of the bankrupt, or by agreement of the parties, on the last adjourned day the petitioner appeared and the bankrupt appeared not; and that, upon the hearing, the bankrupt was adjudged guilty of contempt, and was commanded to de-

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liver up the books and papers to the marshal, and pay the costs, and, upon neglect or refusal to comply with said order, the marshal or his deputy was commanded to take the body of said Allen, and him commit to the keeper of the jail in Chittenden county, to be safely kept until discharged by order of said Court. The return of the deputy marshal upon the warrant is to the effect, that he demanded of the said Allen, in the State of New Hampshire, said books and papers, and said costs, which he refused to deliver or pay, whereupon he was arrested and committed to the jail in Chittenden county, in the State of Vermont.

It is contended, that the return of the jailer is insufficient, upon three grounds: 1st. It appears upon the face of the warrant or order of commitment, that the contempt of which the relator was adjudged guilty, consisted in not obeying an order of the register, which order was not an order of the Court; 2d. That the warrant directed that the bankrupt should be imprisoned until he should be discharged by order of Court, and that his imprisonment does not expire by effluxion of time, or upon the performance of any act, but is limited only by the pleasure of the Court; 3d. That the relator was unlawfully arrested in the State of New Hampshire, by a Vermont officer, and was thence taken to jail in Vermont.

(1.) Upon the first point it is urged that the statute of the United States (*Revised Statutes*, § 725), defines contempt to be misbehavior in the presence of the Court, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the Court in their official transactions, and disobedience or resistance to any lawful order or command of the Court; that an order of the register is not an order of a Court; and that, prior to the adjudication of contempt, no order had been made by a Court in the premises.

By the bankrupt Act, the several District Courts of the United States are constituted Courts of bankruptcy, and it is the duty of the judges of the District Courts in the several Districts to appoint registers in bankruptcy to assist the judge in the performance of his duties under the Act. The register

is empowered to despatch such part of the administrative business of the Court, and such uncontested matters as shall be defined in general rules and orders, or as the District judge shall in any particular matter direct. The register has all powers vested in the District Court, for the summoning and examination of persons and witnesses, and for requiring the production of books, papers, and documents, except the power of commitment. It is impossible that the laborious administrative business of a bankruptcy Court can be performed by one judge. The intricate work connected with the settlement of bankrupt estates requires the time and attention of other persons. The statute has, therefore, empowered him to appoint persons, styled registers, to assist him in the performance of his duties. The powers of the register consist, in general, in the discharge of the administrative business of the bankruptcy Court, and in passing such orders relative to the settlement of the estate as may be uncontested. Within the scope of their authority, the registers are not only officers of the Court, but, in uncontested matters, act in lieu of the judge. Within this scope their acts are the acts of the bankruptcy Court, and their uncontested orders are the orders of the Court. Whenever, therefore, a bankrupt violates an order which the register has the power to make, and the making of which the bankrupt has not contested, and in regard to which he has not desired a reference to the District judge, a violation of such an order is a violation of the order of the bankruptcy Court. The register cannot punish for a violation of his order. That power is reserved to the District judge. But it cannot be implied that, for a non-compliance with the uncontested order of the register, there is no power of punishment, and that the only course is to obtain a re-enactment of the order from the District judge, for a violation of which second order a punishment may be inflicted. The statute which placed so large a part of the details of the settlement of estates in the hands of the registers, evidently intended that their uncontested acts in reference to these details were the acts of the Court of bankruptcy. Under this theory of the law the practice of the District Courts has been



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to enforce the unobeyed orders of the register by proceedings in contempt, which are instituted directly upon a neglect to comply with his order. (*In re Gettleston*, 1 *Nat. Bkcy. Reg.*, 604; *In re Speyer*, 6 *Id.*, 255.)

(2.) When the contempt consists of a violation of the order of the Court, and is a contempt not committed in its presence, and the statute does not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of Court, or until further order of Court. (*Green v. Elgie*, 8 *Jurist*, part 1, 187, per Denman, C. J.; opinion of Ch. J. Kent in *In re Yates*, 4 *Johns.*, 317; *S. C.* 9 *Johns.*, 395.)

(3.) The arrest of the relator by the deputy marshal was without his precincts and within the State of New Hampshire. The language of the officer's return is: "At Carroll, in the District of New Hampshire, I served this warrant by demanding, &c., whereupon I arrested his body, read the warrant in his hearing, and, on the same day, I committed him to the keeper of the common jail at Burlington, in the county of Chittenden, in the District of Vermont." The arrest in New Hampshire was not justified by the order of the District Court, and, the arrest having been illegal, the subsequent imprisonment in the State of Vermont, in pursuance of the original arrest, cannot be justified. When the original arrest is unlawful, the detention is improper, although the warrant under which the improper arrest is made, is valid. The fact that the officer had power to arrest the bankrupt, after he was brought within the State of Vermont, is immaterial, inasmuch as that power was improperly obtained. The principle is thus declared by Lord Holt, in *Luttrell v. Benin*, (11 *Mod.*, 50): "If a man is wrongfully brought into a jurisdiction, and there lawfully arrested, yet he ought to be discharged, for no lawful thing, founded upon a wrongful act, can be supported." The general subject of the validity of the acts of sheriffs over persons or property, in cases where the possession of the person or property was improperly obtained by the officer, is very elaborately discussed in *Hooper v. Lane*, (6 *House of Lords Cases*, 443), and in

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*Ilsey v. Nichols*, (12 *Pick.*, 270). In the latter case Ch. J. Shaw, after reviewing the authorities, concludes as follows: "These cases seem to establish the general principle, that a valid and lawful act cannot be accomplished by unlawful means, and, whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by means of these unlawful means, to his rights." I refer also to *Percival v. Stamp*, (9 *Exch. Rep.*, 167); *Barratt v. Price*, (9 *Bing.*, 566); *Mandeville v. Guernsey*, (51 *Barb.*, 99); *Hill v. Goodrich*, (32 *Conn.*, 589).

The relator having been improperly arrested by the deputy marshal beyond his precincts, although upon a warrant which was valid authority for an arrest within his precincts, the detention is invalid, and the relator is entitled to a discharge.

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*Romeo H. Start and Levi Underwood*, for the relator.

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THE UNITED STATES vs. D. K. OLNEY WINTER.

A person was indicted by the name of D. K. Olney Winter. He moved to quash the indictment, on the ground that he was not described therein by any Christian name: *Held*, that the motion must be denied.

When a person has selected a particular given name as the only given name by which he will be known, such given name becomes part of his legal name, and he is properly described by that name in an indictment, whether it stands first, or second, or third, in the order of his given names.

(Before BENEDICT, J., Southern District of New York, March 17th, 1876.)

BENEDICT, J. The defendant has been indicted by the name of D. K. Olney Winter. He now moves that the indictment be quashed, upon the ground that he is not described

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therein by any Christian name. The argument is, that a middle name forms no part of the legal name, and that, as the initial letter D., given in the indictment, shows that the defendant has a Christian name of which D. is the initial letter, the indictment, on its face, is insufficient, because it fails to give that Christian name in full, and omits to say that it is unknown.

It has frequently been held, that, when a person has a first name by which he is known, and a middle name in addition, he is sufficiently described if the first name and the surname be accurately stated. But, I do not know that it has been settled, in this country, that, when a person has caused himself to be known by a certain given name, and by no other except his surname, he is not properly described in an indictment, when such given name and the surname are set forth. In *State v. Hughes*, (1 *Swan*, 261,) it is said: "The middle name may properly be a part of a person's name."

In this country, no religious or legal ceremony is necessary to entitle a person to use a particular name. A name chosen by the person, by which he has caused himself to be commonly known, becomes his name; and I know of no law to prevent a person from adopting letters alone, not being initial letters, or intended to stand for any word, to be his name. It has been said, that a person can have but one Christian name; but, as pointed out by *Archbold*, (p. 38:) "This must be understood to mean, merely, that he cannot be named 'John, alias James,' or the like." (See, also, *Jones v. Macquillin*, 5 *T. R.*, 195.)

There appears to be no law against a person's having several given names, nor anything to prevent a person from adopting any one of several given names given him at baptism, as the one by which he will be called and known; and, when a person has selected a particular given name as the only given name by which he will be known, I conceive that such given name becomes part of his legal name, and that he is properly described by that name in an indictment, whether it stands first, or second, or third, in the order of his given names.

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If this defendant had chosen to be known by the given name of Olney, with the letters D. K. between it and his surname, he would have been properly described as Olney D. K. Winter. Surely, it can make no difference if the fact be, that, having the right to do so, he has placed the letters D. K. before instead of behind the name by which, as his given name, he has chosen to be known.

This, then, is not a case where no Christian name is mentioned, nor where the Christian name by which a person is known has been designated simply by its initial letter. Here, a given name is set out and, upon a motion to quash, it is to be presumed that such name is the only given name by which the defendant has chosen to be and has come to be known. Having, by such adoption, become the distinctive given name of the defendant, it is properly used to describe him in an indictment, and is sufficient for that purpose. "A person is well described by the name by which he is generally known." (2 *Russ. on Crimes*, 796.)

The motion to quash is denied.

*Benjamin B. Foster*, (*District Attorney*), for the United States.

*Ambrose H. Purdy*, for the defendant.

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Alvord v. The United States.

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THOMAS G. ALVORD AND OTHERS, PLAINTIFFS IN ERROR

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

A. was surety for one S., as postmaster, on his official bond. On the 14th of September, 1861, a new bond, with other sureties, was accepted, whereby A. was, by statute, released from responsibility for all acts or defaults of S. committed subsequently. S. was afterwards removed from office, and at that time was a debtor to the United States. In a suit brought against A., on his bond, to recover such debt, it was not shown by the United States that S. had not in his hands, on the 14th of September, 1861, ready to be paid or applied, all the moneys of the United States with which he was justly chargeable: *Held*, that it must be presumed he had such moneys in his hands when the new bond was given; and that A. was not liable therefor.

(Before JOHNSON, J., Northern District of New York, March 21st, 1876.)

JOHNSON, J. The surviving defendants, with others, were sureties for one Sedgwick, as postmaster, upon his official bond. On the 14th of September, 1861, a new bond, with other sureties, which, in compliance with the requirement of the Department, had been given, was accepted, and thereupon, according to the statute, (*Act of July 2d, 1836, 5 U. S. Stat. at Large, 88, § 37,*) and by force of its provisions, the sureties in the prior bond became released from responsibility for all acts or defaults of the postmaster which might be done or committed subsequently. Sedgwick was removed from office October 21st, 1861, at which time, by his own testimony, he was indebted to the Government in \$3,969 45. A Treasury transcript showed, that, between September 30th and October 21st, 1861, Sedgwick had paid, in excess of the amount debited to him during that period, and was entitled to be credited with, \$1,010 14. There also was given in evidence the quarterly return made by Sedgwick, covering the period from July 1st to October 1st, 1861, by which he appeared, at the latter

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date, to be indebted to the United States in the sum of \$2,933 21. It was further shown, that the amount received at the Syracuse post office, from September 14th to October 1st, 1861, was \$954 09. But, it was not shown that, on the 14th of September, he had not in his possession, ready to be paid or applied as might be lawfully required, all the moneys of the United States with which he was justly chargeable. No demand upon him at this period was proved, no failure to pay or apply any such money as he was lawfully directed was shown, nor did the period for rendering his regular account arrive until the 1st of October. Now, assuming that sufficient data are contained in the proof, to enable the exact amount to be ascertained which he had, or ought to have had, in his hands, belonging to the United States, on the 14th of September, the precise difficulty is, that no light is thrown on the question, whether, in point of fact, he had then this money in his hands, as his duty required, or whether, before that time, he had, by its misapplication, become a defaulter. If he was then a defaulter, the present defendants are liable. If, on the other hand, he then had the money, and subsequently misapplied it, these sureties are not liable, for, the default, in that case, did not occur in their day. In the absence of evidence from which an inference can be directly drawn, the presumption of fact which the law raises must control. That presumption is, that an officer has done his duty, until the contrary appears. It was Sedgwick's duty, under the law and the bond, to keep the money which should come to his hands safely, without loaning, using, depositing in the banks, or exchanging for other funds than as allowed by law, till it should be ordered by the Postmaster-General to be transferred or paid out. This duty he is presumed to have performed, until proof is made to the contrary. If the present action had been against the sureties on the bond accepted September 14th, 1861, on the same proof, they would have been held liable, by reason of the same presumption. This was decided in *Bruce v. United States*, (17 How., 437, 443.) That was a case both of a new commission and a new bond. It was held, that, if a balance

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was due from an officer when reappointed, the presumption is, that it was then in his hands, and, if so, his sureties, on his reappointment, are responsible for its due application. But they may relieve themselves, by showing that he was in fact a defaulter when they became his sureties; and Ch. J. Taney said, giving the opinion of the Court: "No officer, without proof, will be presumed to have violated his duty; and, if Bruce had done so, Steele had a right, under the opinion of the Circuit Court, to show it, and exonerate himself to that amount; but it could not be presumed merely because there appears, by the accounts, to have been a balance in his hands at the expiration of his first term." According to the rule declared in this case, the presumption is, that Sedgwick, on the 14th of September, 1861, was not a defaulter, but that he then had in his hands, in accordance with his duty, whatever sum he was chargeable with in favor of the Government. As the Court says: "If it was not wasted or misapplied during his first official term, but still remained in his hands, to be applied according to his official duty, the sureties in his first bond would not be liable." A reversal must be adjudged on the ground thus far considered.

In respect to the other questions presented, and especially in respect to the claim for a set-off, I agree with the decision of the District Judge, and substantially for the reasons assigned by him.

The judgment of the District Court must be reversed, and a new trial ordered, with costs to abide the event.

*John C. Hunt*, for the plaintiffs in error.

*Richard Crowley*, (*District Attorney*), for the defendants in error.

CHARLES B. WILLIAMS *vs.* BELINDA M. KING.

A woman married in Connecticut, in 1864, executed there, in 1868, a promissory note, which was made and signed by her alone. The consideration for the note was the sale to her, by the payee, of some shares of stock in a corporation. At the time of her marriage she had real and personal property, part of the latter consisting in stocks of corporations, some of which were sold after her marriage, and the proceeds were reinvested in other stocks, both before and after the note was executed, so that the value of the property was not diminished. The shares of stock purchased or subscribed for were issued to her in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney. There was no settlement to her separate use of the property she owned at her marriage, nor had any of her after-acquired property been conveyed to her in consideration of her personal services during coverture. In a suit at law brought against her to recover the amount of the note: *Held*, that, at the time of the execution of the note, she had separate property, under the statutory system of Connecticut in regard to the property of married women, which was intended to be, and was, bound by her contract, and that the plaintiff was entitled to recover.

Under an Act passed in Connecticut, in 1872, a married woman may be sued at law for a cause of action on which she would previously have been liable in equity.

Where a married woman who has a separate estate enters into a contract for its benefit, or for her exclusive benefit, it will be presumed that such contract was made upon the credit of her estate.

A debt contracted for the purchase of property which goes into the actual or constructive possession of the purchaser, is a debt contracted for the benefit of his estate.

The statute of Connecticut in regard to the personal property of married women, construed.

Whether real estate in Connecticut, conveyed to a married woman without words indicating that it was conveyed to her sole use, is to be considered as her separate estate, *quere*.

(Before SHIPMAN, J., Connecticut, March 27th, 1876.)

SHIPMAN J. This is an action of assumpsit against a married woman, to recover the amount of a negotiable promissory note for the sum of \$2,500, made and signed by her alone, dated December 17th, 1868, and payable eighteen months after its date, to the order of William C. Hurd, and by him



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endorsed to the plaintiff. The defendant executed this note in consideration of the sale to her, by the payee, of certain shares of the corporation known as the Silix Lead Company. The case was tried by the Court upon the following agreed statement of facts: "The defendant was married November 2d, 1864, to O. B. King, of Watertown, Connecticut, with whom she has ever since lived as his wife. She executed the note in question at said Watertown, upon the day of its date, to wit, December 17th, 1868, for the consideration stated in the declaration. At the time of her marriage, she was possessed of property, real and personal, exceeding in the aggregate twenty thousand dollars. A portion of the personal property consisted of stocks in sundry incorporated companies, some of which stocks have been sold since her marriage, and reinvestments made of the avails thereof in other stocks, both before and since the execution of said note, which reinvestments have not diminished the value of the property owned by her at the time of her marriage. In making the reinvestments, the shares of stock purchased or subscribed for have been issued to the wife in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney. None of the property owned by her at the time of her marriage had been settled to her sole or separate use, nor has any of her property, since acquired, been conveyed to her in consideration of her personal services during such coverture."

The General Assembly of the State of Connecticut passed, in the year 1872, the following Act: "Actions at law may be sustained against any married woman upon any contract made by her, upon her personal credit, for the benefit of herself, her family, or her estate, \* \* \* \* in the same manner as if she were sole, single and unmarried." It is admitted that this Act simply changed the form of the remedy for liabilities which had been, or should be, incurred by married women, and did not create any new liability, and, therefore, applied to pre-existing contracts. (*Buckingham v. Moss*, 40 Conn., 461.) The statute authorized an action at law against

a married woman for the same cause of action upon which she would previously have been liable in equity. Another Act had been passed in 1869, in regard to suits against married women, but, as that Act was clearly prospective, its effect need not here be considered.

The general question which is now to be determined is, whether, under the statutory system of Connecticut in regard to the property of married women, as that system existed in 1868, a bill in equity could have been maintained against the defendant, to enforce payment of this note from her real or personal property? "The separate estate of a married woman will, in equity, be held liable for all the debts, charges, incumbrances, and other engagements which she does expressly, or by implication, charge thereon." (2 *Story's Eq. Juris.*, § 1399.) Her separate estate is, by implication, charged with the payment of debts contracted for the benefit of the estate, or for her own benefit, and upon her personal credit. Whether the contract was made upon her personal credit depends upon the circumstances of the case; but it is not necessary that the contract should make any reference to the separate estate, and it is presumed that a contract entered into by a married woman having a separate estate, for its benefit, or for her exclusive benefit, has been contracted upon the credit of her estate. (*Corn Exchange Ins. Co. v. Babcock*, 42 *N. Y.*, 613, 638; *North Am. Coal Co. v. Dyett*, 7 *Paige*, 9; *Ballin v. Dillaye*, 37 *N. Y.*, 35; *Mrs. Matthewman's Case*, *Eng. L. R.*, 3 *Eq. Cases*, 781.) The Connecticut statute, which was intended to be in affirmance of the equity principles of the common law, declares the liability of a married woman to be "upon any contract made by her upon her personal credit, for the benefit of herself, her family, or her estate." The contract which is now in suit is a note entered into by a married woman, for the purchase price of stock which she had herself bought. A debt contracted for the purchase of property which goes into the actual or constructive possession of the purchaser, is a debt contracted for the benefit of his estate. (*Ballin v. Dillaye*, 37 *N. Y.*, 35.) These principles being admitted, the

question upon which the parties are at issue is, whether the defendant had or had not any separate estate which could be bound or held liable for the payment of her note. If she had none, her contract was invalid in law and inoperative in equity. If she had separate estate, it is admitted that the contract was, in equity, valid and inoperative.

The statute of Connecticut which was in force in 1868, in regard to the personal property of married women, provided, in substance, that "all the personal property of any woman married since the 22d day of June, 1849, and all the personal property thereafter acquired by a married woman, and the avails of any such property, if sold, shall vest in the husband, in trust for the following uses—to receive and enjoy the income thereof during his life, subject to the duty of expending from such income so much as may be necessary for the support of his wife, during her life, and of her children during their minority, and to apply any part of the principal thereof which may be necessary for the support of the wife, or otherwise, with her written assent, and, upon his decease, the remainder of such trust property shall be transferred to the wife if living, otherwise, as the wife may, by will, have directed, or, in default of such will, to those entitled by law to succeed to her intestate estate." The rights in the personal property of the wife, which are conferred upon the husband by this statute, are a modification of the rights which were vested in him by the common law. He formerly had an absolute estate; he now has a trust estate, with the right to receive and enjoy the income during his life, which income must, however, be appropriated, if necessary, to the support of his wife and minor children. This peculiar statutory estate is very far from being a sole and separate estate of the wife, which is defined to be that estate, either real or personal, which is settled upon the wife for her separate use, without any control over it on the part of her husband. (*Butler v. Buckingham*, 5 Day, 492.) The husband is vested with the trust estate, and the legal title to her personal property, by virtue of his position as husband. He is not trustee to her sole and separate use, but receives and

enjoys the income during his life. By virtue of the marital relation, he has the custody and control of the property, and of the rents and income thereof, until he is removed from the trusteeship for cause, or until he abandons his wife, and, in the latter event only, does the property vest in her as her sole estate. If the wife could, during the trusteeship of the husband, bind the trust property by her own obligations, the checks which the statute has attempted to place upon her right to the enjoyment of the property during her life, would be of very little avail. The intent of the statute was to modify the severity of the common law, and preserve her personal estate for her heirs, but not to place it within her control as her separate estate, unless by the agreement of the parties. Chief Justice Seymour, in *Cooke v. Newell*, (40 Conn., 596,) defines the nature of the estate which is created by the statute, as follows: "The statute *limits* the rights of the husband in his wife's property, but does not deprive him of all rights. It leaves him the income and profits of it, and, except so far as specially restrained, he has the care, management, and control of it during his life. The trust is, therefore, not to the sole and separate use of the wife, free from the control of her husband. She has not that control of it which she has in equity of her separate estate." It follows, that the personal property which is vested in the husband, as trustee, and the title of which has never become divested, is not bound by the wife's contracts.

But, by ante-nuptial or post-nuptial agreement, the wife's property may be settled upon her to her separate use, freed from the trust. The husband may, after marriage, give his own property to the wife, when the rights of creditors do not interfere, in which case she will take a sole and separate estate. The husband will have thereafter, by virtue of the statute, no such use or life estate in the property so given, as would be vested in him in respect to personal property given to the wife by a third person, without words indicating that it was to her sole use. If an absolute gift is made to her by the husband, it is to her exclusive use, although words of exclusive-

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ness are not used, and he cannot resume the use or control of the property by force of the statute. He will be her trustee under the general rules of equity, if necessary to preserve the title to the property, but not under the statute. (*Riley v. Riley*, 25 Conn., 154; *Deming v. Williams*, 26 Conn., 226; *Baldwin v. Carter*, 17 Conn., 201.) The husband may, also, by clear and unequivocal acts, free the property of the wife from the trust which the statute has created, divest himself of the estate which he has in consequence of the marriage, and give to the wife the entire estate and right to the income, so that, as to the personal property which he has thus transferred, while the legal title may remain in him, she will have a sole and separate estate. Merely permitting the title of stocks or bonds to remain in her name, or permitting her to collect interest or dividends, without any other circumstances to indicate his intention, would not show that the trust was waived. But if, in addition, he permits the wife to manage the property as her own, to change its character, to sell it and invest the proceeds in her name, or, if he transfers the stock to her, giving her a certificate in her own name, by these and like acts he furnishes the clear and satisfactory evidence which the law requires, of his intention to relinquish all his claims to her property and to give to her its complete control. (*Smith v. Chapell*, 31 Conn., 589; *Jennings v. Davis*, 31 Conn., 134; *Mason v. Fuller*, 36 Conn., 160; *Hayt v. Parks*, 39 Conn., 357.)

The summary of facts in this case states, that a portion of the personal property which the defendant owned at the time of her marriage consisted of stocks in incorporated companies, some of which have been sold since her marriage, and reinvestments made of the] avails thereof, both before and since the execution of the note in suit. "In making the reinvestments, the shares of stock purchased or subscribed for have been issued to the wife in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney." It thus appears, that, before the execution of this note, the purchased stocks were issued to the

wife in her own name, although the statute provides that all reinvestments shall be made in the name of the husband, as trustee. But, a more significant and unequivocal act, indicating an intent upon the part of the husband to abandon the trust estate, as to a portion, at least, of the property, and give to the wife the interest which he had in that portion, is the fact that the subscriptions for new stock were made by the husband acting not as trustee, but as her attorney. These subscriptions, being made by her attorney, must have been made in her name, and the certificates must also have been issued to her in her name, by the direct agency of her husband acting in her behalf. These positive acts of the husband leave no doubt, under the Connecticut decisions in regard to the statutory status of the wife's property, that he had given to her the entire control of so much, at least, of the personal property as he had then deliberately subscribed for in the name of the wife, and, therefore, that, at the time of the execution of the note, she had separate property, which was intended to be, and was, bound by her contract made for the benefit of her estate.

It is not necessary to decide whether the real estate was the separate property of the wife. The brief statement of facts does not show whether the real estate was situated in Connecticut or not, but it is inferred that it was situated in this State. As it is a question of importance, whether, under the statutes of Connecticut, real estate which has been conveyed to a married woman without words indicating that it was conveyed to her sole use, is to be considered as her separate estate, and as it is a question not necessary to be now decided, I express no opinion upon this branch of the case.

Let judgment be entered in favor of the plaintiff.

*Alvan P. Hyde*, for the plaintiff.

*Edward W. Seymour and John S. Beach*, for the defendant.

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## CARM HART vs. THE CITY OF BRIDGEPORT.

A municipal corporation is not liable to an injured party, for the negligence of its mayor and its police officers, who have sufficient power and ability to preserve the peace and protect property, in not discharging the duty of protecting private property against a known violation of law.

The distinction pointed out between the public, governmental duties of a municipal corporation and its private or corporate duties.

A municipal corporation is not liable for the unlawful acts of its officers, committed *ultra vires*, and not *colore officii*, in the known and wilful violation of law.

(Before SHIPMAN, J., Connecticut, March 28th, 1876.)

SHIPMAN, J. This is an action of trespass on the case, against the city of Bridgeport, a municipal corporation incorporated by the Legislature of the State of Connecticut. The plaintiff, a citizen of the State of New York, alleges, in his declaration, that, on June 23d, 1869, he was, and ever since has been, the owner and possessor of a described parcel of land within the corporate limits of the city of Bridgeport, and upon which a planing mill, foundry and other buildings were situate, and that he was also the owner of a steam engine, boiler and other machinery situate in said buildings, of all which real and personal property he was, on said day, entitled to the undisturbed and quiet enjoyment; that, "on said day, the defendant was, and ever since has been, a municipal corporation, under and by virtue of the laws of the State of Connecticut, having a mayor and other executive officers under his and its control, and having police authority and powers, and a legally constituted police, employed and paid by said city, and under its control, and having all other powers incident to, and necessary for, the full and ample protection of property within its limits, and especially for the protection of the property of the plaintiff, hereinbefore described, from the injury, wrongs and trespasses hereinafter mentioned, all of

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which powers were given and granted to the defendant to enable it, among other things, to protect the said property of the plaintiff and others, and that it then became and was, and ever since has been, the duty of said city of Bridgeport, by reason of the facts aforesaid, and by virtue of the laws of said State of Connecticut, to protect the plaintiff from the injury to his said property and estate, hereinafter mentioned and described ; yet the plaintiff says, that the defendant, its duty in the premises not regarding, did not perform the same, and did not protect the plaintiff in the possession, use and enjoyment of his said property, but wholly neglected and refused to protect him therein, as it might have done, and as it was its duty to have done, but, its said duty not regarding, and contriving and intending to injure the plaintiff, the defendant, on said 23d day of June, 1869, suffered sundry persons, without law or right, and contrary to the mind and will of the plaintiff, and with the full knowledge and assent of the defendant, and in presence of the mayor and police of said city of Bridgeport, with force and arms, to enter into and upon the said premises of the plaintiff, then in the possession of the plaintiff, and to continue in and upon said premises thereafter, until and upon the 27th day of June, 1869, and with the knowledge and consent of the defendant, and of the mayor and police aforesaid, on and during the days aforesaid, unlawfully and with force and arms, to eject the plaintiff from said premises, and tear down and remove said building, and carry away, break and destroy said steam engine and boiler, and said machinery and patterns, and dispose of the same to their own use, whereby the plaintiff has wholly lost and been deprived of the same, though the plaintiff then and there requested and demanded said defendant to protect him in his said property from said unlawful acts so done as aforesaid, as the defendant well knew that all said acts of violence, by which said property was so destroyed, were done without right, or claim of right, to do the same, and that the same were done in violation of law ; yet, then and there contriving and intending to injure the plaintiff, the defendant, by its officers and agents, protected



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said persons in the doing of said unlawful acts, and in the destruction of said property, and, by its officers and agents, then and there prevented the plaintiff from resisting the destruction of said property, as he might and would lawfully have done had he not been so prevented by the defendant, by means of which neglect, wrongful acts and trespasses of the defendant, the plaintiff has been greatly injured, and has lost and been deprived of said buildings, steam engine, boiler, machinery, and patterns of machinery, to the damage of the plaintiff." To this declaration the defendant has demurred generally.

(1.) The principal question of law presented by the demurrer is, whether a municipal corporation is liable to an injured party, for the negligence of the mayor and its public officers, who have sufficient power and ability to preserve the peace and protect property, in not discharging the duty of protecting private property against a known violation of law. The general question of the liability of municipal corporations for negligence in the performance of public governmental duties, and in the performance of corporate duties, has been frequently considered by the Courts in this country. The decisions of those Courts to which we are accustomed to yield the highest respect, have been uniform, and the results which they have reached are clearly stated by Chief Justice Butler, in *Jewett v. New Haven* (38 Conn., 387.) The principles which are here quoted, though contained in a dissenting opinion, are those which have been adopted by an undivided Court in four recent cases in this State. The dissent was upon the application of the principles in the particular case which was then under consideration. The learned Chief Justice says: "1. Officers and agents of the Government partake of its immunity, and are not liable for negligence in the performance of functions or duties which are strictly governmental, whether such agents act in a corporate or individual capacity. But such immunity does not reach to or protect a contractor or his servants, who contracts with the Government, or its officers and agents, to perform a governmental work. 2. Municipal corporations, to the extent that they are authorized or directed

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to exercise public governmental powers and perform public governmental duties, solely for the general good, are governmental agencies, and entitled to immunity in respect to the acts of their subordinate officers or agents. But, where the power and duty are not governmental, and, in special cases, where they are, but where the corporations derive some special pecuniary benefit or advantage from the exercise of the power, or have specially undertaken to perform the duty, in consideration of some special advantage, the rule is otherwise, and they are liable, like other corporations, for actual misfeasance. 3. The original and ordinary municipal agencies for this State are counties, towns and school districts. Special city and borough charters have also been granted to the inhabitants of densely populated portions of towns, at their request, in part to enable them to exercise the ordinary governmental powers which the town before exercised over the same territory, more efficiently, but mainly to enable them to enjoy a variety of other special powers and privileges not governmental, for the special benefit of the local community." To the same effect are the cases of *Oliver v. Worcester*, (102 Mass., 489,) *Buttrick v. Lowell*, (1 Allen, 172,) *Richmond v. Long's Admr.*, (17 Gratt., 375,) *Western Sav. Funds Society v. City of Phila.*, (31 Pa. St., 175,) *Bailey v. Mayor of New York*, (3 Hill, 531,) *Lloyd v. Mayor of New York*, (1 Seld., 369,) *Martin v. Brooklyn*, (1 Hill, 545,) *Western Homœopathic College v. Cleveland*, (12 Ohio St., 395,) *Hewison v. New Haven*, (37 Conn., 475,) *Forbush v. Norwich*, (38 Conn., 225,) *Mead v. New Haven*, (40 Conn., 72,) and *Weightman v. Washington*, (1 Black, 39, 49;) and it may be considered as settled, that "a city which has assumed, or on which is imposed, a public governmental duty, is not liable for the non-performance or negligent performance of such duty, and it makes no difference that the duty is imposed by a special charter which the city has accepted." (*Hewison v. New Haven*, 37 Conn., 475.)

The principal difficulty which Courts have experienced, has been in ascertaining, clearly and accurately, the line of demar-

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cation between public governmental duties and private or corporate duties, and has not been in the determination of the question, whether, for a refusal to discharge public duties, the corporation was or was not liable. Public duties are, in general, those which are exercised by the State as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the State upon the municipal corporation. They are not exercised either by the State or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrong-doers, the construction of highways, the protection of health and the prevention of nuisances. The execution of these duties is undertaken by the Government because there is a universal obligation resting upon the Government to protect all its citizens, and because the prevention of crime, the preservation of health, and the construction of means of intercommunication are benefits in which the whole community is alike and equally interested. Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the Government for the universal benefit. Examples of well understood corporate powers are, the right to make sewers, to introduce water and gas, to establish parks, to build public markets, to regulate private carriers. The difference between these two classes of duties is thus stated by Chief Justice Nelson, in *Bailey v. Mayor of New York*, (3 Hill, 539 :) "The distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or

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municipal character. But, if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company."

Such being the general distinction between governmental and corporate duties, there has never been any difference of opinion as to the class within which the preservation of the peace and the protection of property belongs. The duty has universally been considered to be of a public nature. It is discharged, in general, by the police force of the State or city. These officers are officers of the law, whose appointment is delegated to the city by the State, in order that this general duty may be easily and conveniently performed, and are not, in the exercise or in the non-exercise of their police powers, agents or servants of the city.

(2.) It is claimed by the plaintiff that the declaration also alleges a positive trespass, and the actual commission of an unlawful act by the city authorities, for which the corporation is liable as a trespasser. The allegations are, that the defendant, by its officers and agents, protected the persons who were destroying the plaintiff's property, and prevented the plaintiff from resisting the destruction of said property, as he might have done had he not been so prevented. It is further alleged, that the acts of violence were well known by the defendant to be done without right or claim of right, and in violation of law. The substance of these averments is, that the mayor and the police officers were co-trespassers, not acting *colore officii*, but in open and known hostility to the requirements of law. Assuming that the averments are sufficiently definite to sustain the action, the corporation is not liable for the unlawful acts of its officers, committed *ultra vires*, and not *colore officii*, in the known and wilful violation of law. (*Thayer v. Boston*, 19 *Pick.*, 511; *Buttrick v. Lowell*, 1 *Allen*, 172; *Western, &c., College v. Cleveland*, 12 *Ohio St.*, 375.)

The demurrer is sustained.

*Levi Warner*, for the plaintiff.

*Morris W. Seymour*, for the defendant.

## THE UNITED STATES vs. CHARLES L. LAWRENCE.

L., to an indictment for forgery, pleaded want of jurisdiction in the Court, setting up that he was arrested in Ireland, upon a requisition made by the United States, and was charged with the crimes of forging and uttering a bond and affidavit; that, in pursuance of the British extradition Act of August 9th, 1870, (33 & 34 Vict., ch. 52,) by arrangement between the United States and Great Britain, it was agreed, in respect to his surrender, that he should not, until he had been restored, or had an opportunity of returning, to the British dominions, be detained or tried within the United States for any offence committed prior to his surrender, other than the extradition crimes of forging and uttering said bond and affidavit; that, on the faith of said agreement, he was conveyed within the United States, under an extradition warrant which recited that he was accused of said crimes; that he is subject to be tried for said crimes, and for none other; that the President had directed the district attorney to proceed against him on no charges except those on which he was extradited; that the offences in the indictment are not those on which his surrender was grounded, and not those specified in the said warrant; that he has been held in custody for the crimes specified in said warrant, but was not tried for either of them; and that the Court has no jurisdiction to try the indictment, until a reasonable time shall have elapsed, after his trial for crimes specified in said warrant, that he may have an opportunity to return to the British dominions. To this plea there was a replication; to the replication there was a rejoinder; and to the rejoinder there was a general demurrer: *Held*,

- (1.) In a criminal case, on a demurrer to a pleading, judgment is to be given against the party who has committed the first fault in pleading;
- (2.) Extradition proceedings do not, by their nature, secure to the person surrendered, immunity from prosecution for offences other than the one upon which the surrender was made;
- (3.) There is no provision in the treaty between the United States and Great Britain, of August 9th, 1842, (8 U. S. Stat. at Large, 572,) which confers such immunity; nor is it conferred by the Act of August 12th, 1843, (9 U. S. Stat. at Large, 302,) or by the Act of March 3d, 1869, (15 Id., 337; )
- (4.) The British extradition Act of August 9th, 1870, (33 & 34 Vict., ch. 52,) has no binding force on the Courts of the United States, in regard to the construction of the treaty of 1842;
- (5.) It does not appear that the Executive Department of either the United States or Great Britain has construed the treaty of 1842 as conferring such immunity;
- (6.) No order of the President can have any legal effect to restrict or enlarge the jurisdiction conferred by law on the Courts;

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(7.) The agreement set up in the plea is of no avail as an objection to the jurisdiction of the Court.

(Before BENEDICT, J., Southern District of New York, March 28th, 1876.)

BENEDICT, J. This case comes before the Court upon a demurrer interposed by the United States to a rejoinder filed by the defendant. The proceedings commence with an indictment charging the accused with several offences, all being forgeries, alleged to have been committed within the jurisdiction of this Court, and all, by statute, offences against the United States. The accused was arrested within this District, by virtue of a bench warrant issued out of this Court upon the indictment found, and thereupon, and on being required to plead, interposed a special plea to the jurisdiction of the Court, in which he sets up that he was born a citizen of Great Britain, but had resided within the United States from the year 1847 to the year 1875, when he departed from the United States with intent to take up his residence in Great Britain and resume his duty and allegiance as a subject of Her Majesty the Queen of Great Britain and Ireland; that, on the 7th day of March, 1875, in Ireland, upon a requisition made in behalf of the Government of the United States, he was seized and thereafter charged with the crimes of forging and uttering a bond and affidavit purporting to be the bond and affidavit of one F. L. Blanding, and thereupon such proceedings were had upon said charge, that, in pursuance of the extradition Act of the Parliament of Great Britain, passed August 9th, 1870, (33 & 34 Vict., ch. 52,) by arrangement between the Government of the United States and the Government of Great Britain, it was agreed, in respect to his surrender, that he should not, until he had been restored, or had an opportunity of returning, to Her Majesty's dominions, be detained or tried within the United States for any offence committed prior to his surrender, other than the extradition crimes of forging and uttering the said bond and affidavit, and thereafter, by force of said arrangement and agreement, and upon the faith thereof, an extradition warrant was issued, reciting that the

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defendant was accused of the crimes of forging and uttering a certain bond and affidavit within the United States, by virtue of which warrant the accused was conveyed within the jurisdiction of the United States, where he is subject to be tried for the crimes of forging and uttering the said bond and affidavit, and for no other crime or charge whatsoever. In this plea reference is also made to the Act of Congress of March 3d, 1869, (15 *U. S. Stat. at Large*, 337,) in pursuance of which it is averred, that the President of the United States, on the 21st of May, 1875, issued his order directly to the District Attorney of the United States for the Southern District of New York, wherein said Attorney was directed to stay all proceedings against the accused, except upon the charges upon which he was extradited, until further order. After setting out the order in full, and averring that no further order has been made by the President, the plea goes on to set out a direction from the Attorney General of the United States, addressed to the District Attorney for the Southern District of New York, bearing date December 22d, 1875, which order of the President and direction of the Attorney General the plea avers were made for the purpose of giving the defendant security against "lawless violence," and for the purpose of enforcing in his favor the rights to which he is entitled by virtue of the treaty of 1842, the Act of Congress of 1869, the Act of Parliament of 1870, and the arrangement entered into as aforesaid. The plea then avers, that the offences with which the accused is charged in the indictment are not the offences on which his surrender to the United States was grounded, but are other and different crimes from those specified in said warrant of extradition; and that he has been held in custody for the crimes specified in the warrant of extradition, but he has not been tried for either of said offences; wherefore the accused insists that this Court has no jurisdiction to try the present indictment, until a reasonable time shall have elapsed, after his trial for the crimes specified in the extradition warrant, that he may have an opportunity to return to Her Britannic Majesty's dominions. To this plea the United States filed a replication,

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wherein it is admitted that the accused has been held in custody for the crimes specified in the warrant of extradition, and that he has not yet been tried for the said crimes. It is then averred, that, in the extradition proceedings against the accused, he was not, as in the plea alleged, charged with forging and uttering a bond and affidavit purporting to be the bond of one F. L. Blanding, but that, in said proceedings, evidence of the forging of twelve bonds was offered and admitted and made the basis of the claim of the United States for his surrender. It is then averred, that no arrangement was made between the Government of the United States and the Government of Her Britannic Majesty, express or implied, whereby it was provided and agreed that the accused should not, until he had been restored to, or had an opportunity of returning to, Her Majesty's dominions, be detained or tried for any offence other than the extradition crime on which his surrender was claimed; and it is insisted, that, by the laws of Great Britain and of the United States, as well as by the practice of both parties to the treaty, no limitation exists as to the number and character of the offences for which a person extradited may be tried. The order of the President, set out in the plea, is admitted, but it is denied that such order was issued, or intended to be issued, in pursuance of the Act of Congress of March 3d, 1869, and, after admitting the direction of the Attorney General of the United States, of December 22d, 1875, set out in the plea, the replication proceeds to set out various and sundry other subsequent communications from the Attorney General to the District Attorney, and from the District Attorney to the Attorney General, by letter and by telegraph, in respect to the accused, whereby it is claimed the last instructions of the Attorney General are shown to be to move the trial of the present indictment; and the plea concludes with a general averment, that the offences in the indictment are the same specified in the warrant of extradition, and are not other and different offences, and that the District Attorney is not prohibited by any order or direction, nor is there any contract which should or can restrain him,



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from moving the trial of this indictment. To this replication the defendant filed a rejoinder, in which the facts set forth in the plea are again set forth, without substantial change. To this rejoinder the Government filed a general demurrer; and the cause is thus before the Court on the demurrer.

In determining the questions of law thus presented by these extraordinary pleadings, it is necessary, at the outset, to ascertain what questions are open for determination, inasmuch as it is urged in behalf of the defendant that only the pleading demurred to is before the Court for its judgment upon it, and it is insisted that the rule of pleading in civil cases, that judgment is to be given against the party committing the first fault, is not the rule in criminal cases. Upon this question my opinion is, that the rule of pleading in criminal and civil cases is the same. The same reason for the rule exists in both classes of cases; and, although no criminal case has been cited where the rule has been applied, the rule is stated by *Archbold*, without qualification, as the rule applied in criminal cases. He says, (16 *Eng. ed.*, p. 122): "A demurrer has the effect of laying open to the Court not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; and, if two or more of the pleadings be bad in substance, the Court will give judgment against the party who committed the first fault." This rule is applied the more readily in the present instance, because the examination of the issues of fact raised by the plea and replication is unnecessary, and ought not to be pursued unless it were indispensable to the protection of the legal rights involved. The entire record being thus before the Court, I pass at once to the plea, and proceed to determine whether the facts there stated are sufficient in law to show that this Court has no jurisdiction to try the present indictment.

In disposing of the questions argued before me upon this demurrer, I first notice the position taken, that all extradition proceedings, by their nature, secure to the person surrendered immunity from prosecution for offences other than the one upon which his surrender was made. This question is not

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open in this Court. It was decided in *United States v. Caldwell*, (8 *Blatchf. C. C. R.*, 131). That determination has since received strong support from the decision of the Court of Appeals of this State, in *Adrianse v. Lagrave*, (59 *N. Y.* 110,) where the existence of any such immunity was denied in a civil case; and it should be noticed that the present Circuit Judge of this Circuit took part in the decision of the Court of Appeals, being then a member of the Court. This ground of defence is, therefore, dismissed, with the remark, that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and the justice he has offended no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm.

But, here it has been contended, that the accused has such immunity by reason of the provisions of the treaty of August 9th, 1842, (8 *U. S. Stat. at Large*, 572,) under which his surrender was made, which, it is correctly said, is a law of the United States binding upon the Courts. The decision in *Caldwell's* case is decisive of this question also, for, *Caldwell* was surrendered under the treaty of 1842. But, as no argument was made in *Caldwell's* case based upon the provisions of this particular treaty, the argument now made in support of this construction of the treaty may properly be examined.

At the outset, let it be noticed, that no language is used in the treaty which can be supposed to confer the immunity here claimed. On the contrary, the language of the treaty is calculated to repel the idea, for, it declares that the offender shall be "delivered up to justice"—a significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice, without qualification.

It is, however, argued, that both the parties to this treaty have placed a construction upon its provisions, which confers the immunity for which the accused contends; and reference is made to the Acts of Congress of August 12th, 1848, (9 *U. S. Stat. at Large*, 302,) and March 3d, 1869, (15 *Id.*, 337, *U.*

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*S. Revised Statutes*, §§ 5270 to 5277,) and to the British extradition Act of August 9th, 1870, (33 & 34 *Vict.*, *ch.* 52,) as supporting the assertion.

The Act of Congress of 1869 is a general law, intended for the protection of extradited offenders; but, the protection it confers is expressly limited to cases of "lawless violence." It is true, that it assumes, as well it may, that the offender will be tried for the offence upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offences. The absence of any provision indicating an intention to protect from prosecution for other offences, in a statute having no other object than the protection of extradited offenders, is sufficient to deprive of all force the suggestion that the Act of 1869, as a legislative Act, gives to the treaty of 1842 the construction contended for by the accused.

So of the Act of 1848, the provision of which relied upon, (§ 3,) is, that it shall be lawful for the Secretary of State to order the offender "to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign Government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly." It does not seem reasonable to suppose that it was the intention of Congress, by the above language, to give a legislative construction to the existing treaty of 1842. The provision of the Act of 1848 is within the broad provision of that treaty, but does not restrict the operation of that provision; and it may be safely assumed, that, if the intention to limit the effect of, or give a construction to, that or any other treaty, had been entertained—assuming such a function to belong to a statute of this character—that intention would have been plainly expressed.

The Acts of Congress referred to, therefore, fail to afford a legislative construction of the treaty, in the particular under consideration.

It is still more difficult to find support for the doctrine of the defence in the provisions of the British Extradition Act

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of 1870. How can it be, that, without any action on the part of the treaty-making power of the United States, the Parliament of Great Britain, by a statute of Great Britain passed 28 years after the treaty of 1842, can engraft upon that treaty a provision of immunity not found in the treaty, and which must thereafter be enforced by Courts as part of the laws of the United States? The effect proper to be given by the Executive Department of the Government to any condition found in an extradition statute of Great Britain, to which the Government of the United States has assented in any particular case, is not under consideration. Here, the question is judicial, and it is, whether the British Act of 1870, by reason of its subject-matter, becomes a law of the United States, and, as such, affords a legislative construction of this treaty, binding upon the Courts of the United States. Upon such a question no time need be spent, and it is dismissed with the observation, that it would appear that the English Courts incline to the opinion that the Act of 1870 has no effect in England, even, to limit the operation of the treaty of 1842, as is seen by the opinions delivered in the Court of Queen's Bench, in *Ex parte Bouvier*, (27 *Law Times R.*, 844). The words of the Lord Chief Justice, in that case, are: "I see plainly what was the intention of the Legislature—that is to say, it was intended," (by the Act of 1870,) "while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force."

Nor is it made to appear that any such construction of the treaty of 1842 has been adopted by the Executive Department of either Government. An agreement for such immunity in the present instance is set up by the plea. But, it is competent for the Government of the United States to enter into such an agreement with the Government of England, in the absence of any provision for immunity in the treaty; and the demand for such an agreement on the one side, as well as the giving thereof on the other, leads to the inference that no such protection is afforded by the treaty itself. A single instance of such an agreement does not, therefore, help the

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argument. The understanding of the treaty by the Executive Department, is better shown by the action taken or omitted in the cases that have arisen where there has been no agreement. Thus, in the case of Heilbronn, who was surrendered by the United States upon the request of England, for an extradition crime, a trial was had in England for an offence not provided for in the treaty, without interference by the Executive there, and without complaint from the Government of the United States. So, also, Burley, an offender surrendered by England to this Government, was put upon trial in this country for an offence other than the one upon which he was extradited, and, the case being called to the attention of the law officers of the crown, it was considered, that, "if the United States put him *bona fide* upon his trial for the offence in respect of which he was given up, it would be difficult to question their right to put him upon his trial also for piracy, or any other offence which he might be accused of committing within their territory, whether or not such offence was a ground of extradition, or even within the treaty." (*Clarke on Extradition*, 2d ed., p. 90, note.) No case has been referred to where the right above spoken of has been questioned by the British Government. On the contrary, if I am correctly informed, such right has not hitherto been denied in England.

As to the effect of the fact of a previous trial for the offence for which the offender was given up, to which allusion is above made, it is plain that such fact is immaterial in determining the judicial question, where legal immunity is set up by way of defence in a prosecution for other offences, however important that fact might be, as evidence of good faith, in determining the political question, when it arises.

It may be added, that the action of the Executive Department of the Government of the United States, in the cases where extradited offenders have been tried in this country for offences other than those upon which their surrender had been asked, has a significant bearing upon the legal question under consideration, because, in criminal cases, as distinguished from civil cases, the Executive, by reason of the power conferred by

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law to control the prosecuting officer, as also its power to pardon, is not confined to a consideration of the political question alone, but may also act upon a determination of the judicial question.

But, it is further said, that the British Act of 1870 amounts either to an abrogation of the extradition section of the treaty of 1842, or to a modification of the provisions; and that, inasmuch as, by the 11th section, the Government of Great Britain could at any time abrogate that portion of the treaty, the Act of 1870, if considered by the Government of the United States as an abrogation, would have been so declared, and, in the absence of such a declaration, must be considered to be acquiesced in by the Government of the United States, as its construction of the treaty, and becomes a part of the treaty, binding upon the Courts. This proposition is answered by what has been already said in regard to the effect of the British Act of 1870, and the action of the Government of the United States in the cases which have hitherto arisen. Moreover, if the action of the two Governments, and the Act of 1870, be given the utmost effect possible in favor of the accused, all that can be extracted from them is an implied engagement to afford protection to persons extradited in pursuance of the treaty, from prosecution for causes other than those upon which their surrender was asked—which addresses itself to the political, not to the judicial, department. It is not intended to suggest that such can be their effect, but simply to express the opinion, that, in any aspect, they have no greater effect, and in view, of the language of the treaty, cannot be relied on as affording a Legislative or Executive construction of that instrument, binding upon the Courts.

It may, therefore, without hesitation, be declared, that the claim of legal immunity, here made, is without foundation in the treaty of 1842. In support of this conclusion, reference is made to the authority of the Court of Appeals of the State of New York, which high Court, in Lagrave's case, was called on to consider the effect of this same treaty.

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\* There remains to be examined that portion of the defence which is based upon the order of the President and the direction of the Attorney General, set out in the plea. In regard to this defence, it is sufficient to say, that no order of the President, nor direction of the Attorney General, can have any legal effect to restrict or to enlarge the jurisdiction conferred by law upon the Courts. The Courts, in determining the extent of their jurisdiction, look to the law, and, within that jurisdiction, they are absolutely free from the control of any other department of the Government. (See the remarks of Blatchford, J., in *The United States v. Blaisdell*, 3 *Benedict*, 143.) It should be observed, in this connection, that it is evident that neither the order of the President, nor the communication of the Attorney General to the District Attorney, of December 22d, 1875, set out in the plea, were intended to be resorted to as matter of defence, but are official communications intended solely for the consideration and guidance of the officer to whom they were addressed, and, presumably, have no reference whatever to judicial action. The mass of letters and telegrams with which the record is encumbered are, therefore, to be considered as wholly irrelevant. They are outside the case and constitute no ground of objection to the jurisdiction of the Court.

It may be added, that the presence of this indictment before the Court, and moved for trial by the District Attorney, by whom the Government is represented before the Court, as also it may now be by the Attorney General in person, by virtue of the Act of June 22d, 1870, (16 *U. S. Stat. at Large*, 162, now *U. S. Rev. Stat.*, § 359,) is inconsistent with the averment that the trial is moved in opposition to the directions of the Attorney General. When the Attorney General of the United States, having knowledge of the moving of a criminal trial, permits the moving thereof, in law he directs the same, and the Court must consider the trial to be moved by the Government.

All the positions taken in behalf of the accused have now been examined, except that based upon the fact set up in the

plea, that, in the case of the accused, an express agreement was made between the Government of the United States and the Government of Great Britain, by which it was provided and agreed, that the accused should not, until he had been restored, or had an opportunity of returning, to her Majesty's dominions, be detained or tried within the United States, for any offence committed prior to his surrender, other than the crime of forging and uttering the said bond and affidavit, on which his surrender was thus claimed. Upon this point the argument made is, that, the existence of such an agreement being admitted by the demurrer, it must be recognized by the Court, and the accused be protected by the Court from prosecution upon an indictment charging offences other than those mentioned in the agreement, as stated. This position is supposed to be supported by the rule applied in civil cases, when a defendant has been inveigled within reach of the process of the Court. But, the rule referred to has no application in criminal cases. The duty of the Courts in criminal cases is stated by the Court of King's Bench, in *Ex parte Scott*, (9 B. & C. 447.) Scott was indicted in England for perjury, and a warrant for her arrest issued. The officer proceeded to Brussels, and, there finding Scott, seized her without resort to extradition proceedings or other legal process. Application for assistance was then made by her to the British ambassador at Brussels, who refused to interfere, and she was carried to London, where she was brought before the Court upon *habeas corpus*, and the above facts made to appear. Lord Tenterden, C. J., in delivering the opinion of the Court, thus lays down the rule in criminal cases: "The question is, whether, if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them." These words express the opinion of this Court. A different rule would seriously embarrass the administration of the criminal laws, and cannot be permitted here to obtain, until it has received



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the sanction of controlling authority. If, then, an agreement exists between the Government of the United States and the Government of Great Britain, such as is set forth in the plea, the performance thereof is within the power of the Government, by reason of its legal control over the prosecuting officer; and all that need be said here is, that such an agreement can avail nothing to a defendant setting it up by way of plea to the jurisdiction of the Court before which his trial is moved by the Government.

The decision, therefore, must be, that the plea to the jurisdiction, and all subsequent pleadings in this case, be set aside, with liberty to the defendant to plead anew to the charges in the indictment contained.

*Benjamin B. Foster*, (*Assistant District Attorney*,) for the United States.

*Benjamin F. Tracy*, for the defendant.

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WILLIAM D. ANDREWS AND OTHERS

vs.

THEODORE A. CARMAN. IN EQUITY.

The reissued letters patent granted to Nelson W. Green, May 9th, 1871, for a process of constructing wells, are valid.

The state of the art of constructing wells at the time Green made his invention, explained.

The peculiar features of Green's well, called the "driven well," explained.

The claim of the patent, namely, "The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upwards, as it is in boring, substantially as herein described," is a claim to a process: and the element of novelty in

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the process consists in driving a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, so that the process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum in the water-bearing strata of the earth, and at the same time in the well pit.

The claim may also well be construed as claiming the well as a manufacture constructed according to the process described.

A chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by putting it to a practical and intelligent use, first makes it available to man.

The question of the dedication and abandonment of his invention, by Green, to the public, considered.

The question of Green's delay in applying for a patent, for more than four years after he made his invention, considered, as bearing on the question of abandonment.

(Before BENEDICT, J., Eastern District of New York, April 24th, 1876.)

BENEDICT, J. This is a suit in equity brought by the owners of a patent issued to Nelson W. Green, on May 9th, 1871, designated as reissue No. 4372, against Theodore A. Carman, for an injunction and damages because of an infringement of their patent. The case presents issues belonging to nearly every class known in patent litigations. Of the various questions so elaborately discussed before me, I shall first notice those relating to the construction of the patent.

The patent is for a process of constructing wells. In order to a correct understanding thereof, the state of the art should be first briefly explained. A well consists of a pit sunk in the earth until a water-bearing stratum of the earth is reached, from which the water therein will flow into the pit, and a supply of water be thus obtained. Two forms of well have long been known—one, the ordinary domestic well; the other, the artesian well. In the ordinary well, the well pit is sunk to a water-bearing stratum of the earth, from which the water will, by reason of the natural forces operating upon it, as it lies in the earth, ooze or flow from the earth into the bottom of the pit, as a reservoir, in sufficient quantities for the ordinary

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purposes of domestic use. In the artesian well, the well pit is sunk in the earth until a water-bearing stratum is reached where the water lies under the pressure of such a head, that, when struck by the well pit, it will come into the pit so rapidly that a stream of water is produced, flowing, by the force of its own current, from the earth, into and through the well pit, to the surface. These two forms are not different in their method of operation. Both rely upon the natural forces, as they are found operating upon the water in the water-bearing stratum reached by the well pit, to force the water from the earth into the pit. In both these forms the pit has uniformly been made by loosening the earth or rock and removing it upwards and out upon the surface, either by means of the spade or the drill or auger, and the sand bucket.

In this state of the art of obtaining a supply of water from the earth, a new form of well appeared, now known as the driven well, which forms the subject of this controversy. This well embodies an idea not present in any other form, namely, that the water in the water-bearing strata of the earth may, by the application of artificial power, be forced to flow from the earth into the well pit, with increased rapidity, so that a well pit only a few inches in diameter, sunk to a moderate depth, will afford an abundant supply of water, and constitute a practical and productive well. The characteristic difference between the driven well and other forms consists in the practical application of this new idea. In previous forms, the rapidity with which water flows from the earth into the well pit is dependent upon the natural forces as they happen to be found operating upon the water lying in the water-bearing stratum to which the well pit is sunk. The driven well adds artificial power, so applied as to cause a great increase in the rapidity with which the water in the earth will flow from the earth into the well pit. The foundation of this new form of well is the discovery that, if a pipe, with an opening at the lower end, be driven into the earth, extending down air-tight until it reaches the water, and have a pump attached air-tight to its upper end, and a vacuum be created in the pipe so fitted

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and connected with the water in the earth, water will flow abundantly from the earth into the pipe. The novelty consists in making the well pit to consist of the tube of a pump connected tightly with the earth. This is accomplished by driving into the earth a tube to be used as the tube of a pump and at the same time as the pit of a well. This manner of inserting the tube renders it possible, by means of a pump attached to the tube, to create a vacuum in the pit of the well, and at the same time in the water-bearing stratum of the earth.

This discovery once made, its application to the purpose of obtaining a supply of water from the earth, for the use of man, was a natural consequence; and it was at once applied to practical use, by substituting, in place of the larger excavation ordinarily made to serve as a well pit, a moderate sized tube driven tightly into the ground and having a pump attached. The advantages secured by this method are manifold. As the force with which the water will flow into the well pit is greatly increased, a tube of moderate diameter forms a sufficient well pit, thereby saving much expense and labor in constructing the well pit. Good water may, by this method, be reached when the surface water is bad. The well pit being air-tight, all water is excluded except that lying in the water-bearing stratum to which the pit is sunk. By this method, a quicksand may be overcome, when it would otherwise prove an insurmountable obstacle. By this method, all danger of using water fouled by dirt or noxious matter thrown in from the surface is avoided; and, by this method, water can, in most localities, be obtained with cheapness and without delay. To these obvious advantages must be added the noticeable one, apparently demonstrated by the experiment made, that the supply of water thus obtained directly from the water-bearing strata of the earth, by the simple action of an ordinary pump attached to a tube driven tightly into the earth, is measured by the quantity of water lying in the stratum to which the tube is sunk, so that, in most instances, the supply obtained by this method is constant and inexhaustible, when the reservoir of an ordinary well sunk in the same place would speedily give out. The differ-

ence in this respect is remarkable, and apparently of great importance.

It is plain, therefore, to see that the subject under consideration has utility. It seems also plain that it is patentable as a new process. A well is not a machine, but a process. It is a method of obtaining a supply of water from the earth. No change in the qualities of water is effected by a well. The water is subjected to no treatment whereby a better article is produced. No mechanical device is necessary. A pit is sunk under such circumstances that water flows into it from the earth, and thus becomes available for use. What is accomplished by the process is, that water is obtained by the operation of the powers of nature upon the water lying in the earth. The difference between the new process under consideration and the old is, that the pressure of the atmosphere, which, in the ordinary well, operates at the sides and bottom of the well pit, to maintain an equally distributed atmospheric pressure upon the water, whereby the flow of water into the well is made dependent upon the force of gravity, in the new process is removed from within the well pit, and ceases there to operate against the inward flow of water, so that the pressure of the atmosphere operates with its full power to force the water in the earth from the earth into the well pit, and without any opposition caused by meeting, in its flow, the pressure of the atmosphere at the sides or bottom of the pit. This process involves a new idea, which was put to practical use when the method was devised of fitting tightly in the earth, by the act of driving without removing the earth upwards, a tube open at both ends but otherwise air-tight, and extending down to a water-bearing stratum, to which is attached a pump, a vacuum in the well pit, and at the same time in the water-bearing stratum of the earth, being necessarily created by the operation of a pump attached to a pipe so driven:

It has been supposed by the counsel for the defence, that the invention under consideration must consist of some new instrument, machine, or mechanical device, and they say: "The well, consisting of a vertical shaft with a reservoir of

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water at the bottom, being known, in all its varieties, from time immemorial, what was there for any one to invent? Clearly, nothing but some new instrument, machine or mechanical device for sinking the shaft down to the water, or of raising the water to the surface. It is impossible to conceive any other field of invention connected with the subject." Here is disclosed a clear misapprehension. The novelty of the process under consideration does not lie in a mechanical device for sinking the shaft or raising the water to the surface, but in the method whereby water, by the use of artificial power, is made to move with increased rapidity from the earth into the shaft, whence it results, that a tube but a few inches in diameter, driven down tightly to a water-bearing stratum of the earth, affords an abundant supply of water to a pump attached thereto, and constitutes a practical and productive well. Such an invention is without the field of mechanical contrivance. It consists in the new application of a power of nature, by which new application a new and useful result is attained. There is no new product, but an old product—water—is obtained from the earth in a new and advantageous manner.

There can be no patent for a principle; but, "for a principle so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects, in any trade, mystery or manual occupation, there may be a patent." The idea or principle of forcing water from the earth into a well pit by the use of artificial power is new, but is not by itself patentable. The idea, when made available by a method whereby it is put to practical use, is patentable as a process, and is thus secured to the person who has conceived the idea and invented the method. That method, in the present instance, consists in accomplishing the result first conceived by the inventor to be possible, by creating a vacuum in the water-bearing stratum of the earth and at the same time in the well pit, by means of a tube projected into a water-bearing stratum of the earth, and connected tightly with the earth, to which tube a pump is attached at the upper end. This constitutes "a combination or arrangement of processes to work out a new

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and useful result." It is "a process combining instrumentalities before known, but not employed together, to accomplish a new and useful result." The elements of the process may be old, but, when combined for the purpose of putting to practical use the new idea of forcing water in this way from the earth into a well pit, they constitute a new and useful process, within the meaning of the patent laws.

I have now pointed out what, in the light afforded by the history of the art, appear to me to be the patentable features of the structure known as the driven well. These views I conceive to be in harmony with the law upon this subject, as declared by the authorities, and to derive support from the following cases: *Roberts v. Dickey*, (4 *Fish. Pat. Cas.*, 532;) *McClurg v. Kingsland*, (1 *How.*, 202;) *Foot v. Silsby*, (2 *Blatchf. C. C. R.*, 260;) *Leroy v. Tatham*, (22 *How.*, 132;) *Neilson v. Harford*, (1 *Webster's Patent Cases*, 810;) *Tilghman v. Morse*, (9 *Blatchf. C. C. R.*, 421;) *Crane v. Price*, (1 *Webster's Patent Cases*, 377.)

I next proceed to examine the language of the patent upon which this action is founded, in order to determine whether the invention I have thus described is secured thereby. And here I meet one of the many sharp issues of this controversy; for, while the eminent counsel for the plaintiffs is clear that the patent does describe and cover such an invention, counsel on the other side, also eminent, contend with great earnestness, that the patent describes and covers nothing but the process of making a hole in the ground, and declare that the "pretended invention is a fabrication as discreditable as the patent is absurd." It is not difficult to agree with counsel that the patent is absurd, if it be true that it describes nothing but the process of making a hole in the ground. On the other hand, it is not easy to understand how a patent for nothing but the process of making a hole in the ground could be the result of the vigorous contest waged before the examiner, the examiners-in-chief, and the Commissioners of Patents, and also, on appeal, before the experienced Judge of the Supreme Court of the District of Columbia, which was supposed to have terminated

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successfully for the inventor, when it was finally decided, upon appeal, that a patent must issue to Green for the invention described in his "broad claim." It seems natural to suppose, that a patent issued under such circumstances was intended to cover something more than the process of making a hole in the ground; and I think it can be shown, that the language of the patent, when construed according to the settled rules applicable in such case, does cover something more, and secures the invention I have above endeavored to describe.

The language of the claim may be first considered. It is as follows: "What I claim as my invention, and desire to secure by letters patent, is, the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upwards, as it is in boring, substantially as herein described." Here the invention is stated to be "a process of constructing wells," not a process of making holes. A well is more than a hole. As has been shown, it is a process of obtaining a supply of water from the earth. The words, "the process of constructing wells, substantially as herein described," are, therefore, equivalent to, "the herein described process of obtaining a supply of water from the earth."

Nor is the scope of the claim, as thus understood, limited by the other language of the claim, wherein it is stated that an instrument is to be driven, and driven into the ground, and driven until it is projected into water, and so driven that the earth is packed tightly around it—for that is the necessary result of driving the instrument without removing the earth upwards—and, when so driven, is to remain. Here is described the characteristic feature of the process of constructing a driven well, but no well is described. Not even a hole in the ground is described; for, it is not stated that the instrument driven into the ground is to be withdrawn, or that it is to be hollow. To suppose, therefore, that it was the intention to secure no more than the operation described in the claim, as being a process for constructing a well, is to suppose an absurdity. The operation described in the claim not only will



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not produce a well, but it is no step in the operation of constructing any kind of well, except the driven well. The claim points out that an instrument is to be driven to form a well pit, but how it can be that a well pit is the result of such an operation is not pointed out in the claim. Plainly, it was not intended, by the language of the claim, to describe fully the invention intended to be covered by the patent. Necessarily, therefore, and naturally, we are referred by the claim to the specification, for the full description of the process which the patent was intended to secure. In the specification, we find stated more clearly the distinguishing feature of the process, wherein it differs from any process before adopted for procuring a supply of water from the earth; for, the specification says, that an instrument is to be driven into the ground until it reaches water, having the earth packed tightly around it. It is by means of this packing of the earth tightly around the tube, that the force developed by the creating of the vacuum in the well pit is brought to bear directly upon the water lying in the water-bearing stratum, to force it into the well pit; and this driven tube forms the well pit of the new invention, for, as stated, it is to be a tube made air-tight throughout its length, except at its lower end, where are to be perforations for the admission of water, and through and from which the water may be drawn by a pump. The specification also mentions the vacuum, and points out where it is to be created, for, a vacuum must of necessity be formed in the well pit and in the water-bearing stratum, by operating a pump attached to such a tube, so driven into the earth.

I find, therefore, in the specification of this patent, either set forth in terms, or by necessary implication, all the elements of the process known as the driven well; and this description is such, that no one can perform the operation thus described, without obtaining a supply of water by the process under consideration, and by the use of the same idea which it is claimed was first conceived by Green.

Neither is there anything in that part of the specification stated to be made with reference to the drawings, to enable

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the process to be put to use, which excludes this invention from the patent. It is there said, that the tube may be contracted at its lower end, but it is also carefully stated, that the contraction must be "slight," and only to insure an easy passage to the place to which the tube is to be "driven or forced," thus maintaining the necessary feature of a tight connection between the tube and the earth, effected by the driving of the tube without removing the earth upwards, upon the preservation of which the success of the process depends. So, it is stated that the diameter of the tube to be driven may be "somewhat" smaller than the diameter of the well. Still, it is plain that the tube is always to be driven, whence, of necessity, it results that the earth is packed tightly around it.

But, it is said that the specification covers a flowing well, in which the features of the driven well do not exist. It is true, that the patent contains the statement, that, "in some cases, the water will flow out from the tube without the aid of the pump;" but, it will be observed, that this statement of a fact is not contained in the description proper of the invention. The specification first states in what the invention consists. Then, to enable others to use the invention, a description is given with reference to drawings; and, following this, is the statement under consideration, which can properly be considered to be simply the statement of a circumstance that sometimes occurs in conducting the operation, and which, when it does occur, obviously renders it unnecessary to go further in the operation by adding the pump, which, plainly, is supposed to be necessary in all cases where such a stream of water is not struck.

It thus appearing that the invention claimed by Green is found described in his specification, inasmuch as no violence will be done to the language of the claim by construing it to cover the invention, it is the clear duty of the Court so to construe it. "If, by examination of the specification, and applying it to the then existing state of the art, we can learn what the invention was, then the claim, which was designed to

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be a condensed summary of the invention, is to be construed so as to be co-extensive with the invention, if that can be done without doing violence to its language." (*Whipple v. Middlesex Co.*, 4 *Fish. Pat. Cas.*, 41. See, also, *Waterbury Brass Co. v. N. Y. Brass Co.*, 3 *Fish. Pat. Cas.*, 47; *Leroy v. Tatham*, 14 *How.*, 181; *Harworth v. Hardcastle*, 1 *Webster's Patent Cases*, 480; *Turrill v. Railroad Co.*, 1 *Wall.*, 491.) So construed, this patent becomes co-extensive with the discovery, and secures an exclusive right to use the new idea or principle put to practical use by the new process described; for, to use the language of the defendant's counsel: "If Green invented a process, it was not in fact dependent on the particular form of the instrument, nor does his specification so claim it." The right secured by the patent is not, then, the right to certain instruments, nor to a combination of instruments, but it is the right to use his discovery in any method presenting the characteristic features of his method, and accomplishing the same result in substantially the same way.

But, it is said, that the evidence shows that no such idea or process was in the mind of Green at the time when he claims to have made his invention. As I view the testimony, the contrary of this is shown. Not to mention the testimony which Green now gives, when he describes his invention, there are several witnesses who heard him describe his invention at the time when he claims to have made it, and what they say he then disclosed as his new method of obtaining a supply of water from the earth, appears to be a complete description of the invention covered by the patent, as I have construed it. The proofs show that the patentee not only conceived this process and put it in operation, but stated, in terms, that its success depended upon a vacuum being formed by the pump, and that the tight connection between the earth and the well pit, by the act of driving the tube, was necessary to enable the vacuum to produce the sought for result upon the water lying in the earth.

Furthermore, it may be remarked, as bearing not only upon the language used by Green when he first described his inven-

tion, but also upon the language used in the patent, that the statement that a pump is to be attached to a tube forming a well pit, and driven to a water-bearing stratum without removing the earth upwards, involves, by necessary implication, the idea of a vacuum in the earth and in the well pit, as such a vacuum must result from the operation of the pump, provided the tube be driven tightly in the earth, as described. And this leads to the further remark, that the idea of a pump to be attached to the tube forming the well pit seems necessarily to be involved in the idea of using such a tube as is described for the pit of a well. The sole object of the well being to obtain a supply of water, and it being manifest that water could not be procured from such a tube by hand or bucket, the statement that such a tube is to be the well pit, carries with it the idea of a pump attached thereto, that being the only practical method by which water could be drawn from such a tube.

I, therefore, understand this patent to be a patent for a process, and that the element of novelty in this process consists in the driving of a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, which process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum in the manner described.

But a somewhat different reading of the patent may be adopted, and supported by authority high in this Court upon such a question. The claim, it will be recollected, states the invention to consist of "the process of constructing wells, substantially as herein described." This language is nearly identical with that which came under the consideration of Mr. Justice Nelson, in *Many v. Jagger*, (1 *Blatchf. C. C. R.*, 372.) There, the claim was for the manner of constructing wheels "with double convex plates, one convex outwards and the other inwards, and an undivided hub, the whole cast in one piece, as herein fully set forth." This language was held to

secure the thing made by the process described. There was, it was there said, no claim to the parts of the wheel taken separately and distinct from the perfect wheel, but the claim was for the entire wheel, as the patentees had constructed it, as a new manufacture. There was no novelty in the parts taken separately, but the "instrument," that is, the wheel produced in the manner described, was held to be secured by the claim. The form was held not to be material, as the wheel was one of those manufactures where the particular form of the thing is not essential to its utility. In the present case, then, the well may be taken to be a manufacture, and the claim of "a process of constructing wells," like the claim of "a manner of constructing wheels," will cover all wells constructed according to the process described, without regard to form, and whether the parts taken separately be new or old. See *Many v. Jagger*, (1 *Blatchf. C. C. R.*, 372.) See, also, *Goodyear v. The Railroad*, (2 *Wallace, Jr.*, 356.)

I have now to speak of a third construction of this patent, which has been strenuously contended for. It has been supposed that this patent can be upheld as being for an operation claimed to be new, as an operation in the process of making a well, or in its association with other operations of making a well, namely, the making of a well pit by forcing an instrument into the ground and moving the earth only laterally. The point of the invention is, by this construction, made to consist in a new manner of constructing the well pit, that is, by puncturing instead of excavating. The great stress which has been laid upon this view of the patent by counsel so learned, the opinion expressed by the expert called by the plaintiffs, and the vigor of the opposition made to such a construction, have led me to pause and consider whether I must not have fallen into error in supposing that the patent can rightfully be held to cover and secure, not a process of sinking a well pit, but the process of obtaining a supply of water from the earth, which I have found to be detailed in the specification, and endeavored to describe. But, the view I have expressed is so firmly impressed upon my

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mind, that I shall rest my decision upon it, and leave the more learned judges before whom the patent must shortly come to detect my error, and to uphold or destroy the patent as being for a method of sinking a well pit by puncturing instead of excavating.

The interpretation I have thus given to the patent renders it unnecessary to pass upon the evidence in the case, given to show that, prior to the time when Green claims to have made his invention, well pits had been sunk by puncturing the earth.

Was Green the man entitled to secure the invention which his patent describes? The evidence is convincing, that Green first conceived the idea, explained his idea to others, and caused the feasibility of his process to be tested by actual experiment. Comment has been made upon the fact that the particular tools and devices used in constructing the first wells made were not pointed out by Green. But, such comment loses its force, when it is considered that the tools and devices employed in sinking the shaft form no part of the invention claimed by Green. The invention consists in the method of putting to a practical use the new idea or principle of increasing the productive capacity of a well, by forcing water directly from the earth into the well pit, artificial power being employed to create, by the operation of a pump attached to a tube driven tightly into the earth, a vacuum within the tube and the water-bearing stratum into which it is projected, whence follows an increased pressure upon the water in the earth towards the well pit, and an abundant supply of water is afforded to the pump. This conception was of such a character, that, when described, there was left nothing to be done but to test its correctness by an experiment so simple, and involving the use of means in such common use, that it could be fully tested by any one, upon the mere statement of the idea. In the present instance, the process was, at the outset, put to the test of an experiment conducted near Green's house, in his presence, and under his directions. His idea, and his process of putting it to a practical use, then became part of the property

of the public, available for the purposes intended, unless it be secured by the patent in question. Subsequent experiments are spoken of in the evidence, which may properly be claimed by Green as his experiments, for, they were conducted in pursuance of his directions, by those acting at the time under his orders.

Furthermore, it should be remarked, in this connection, that, when Green first stated his idea and described his process, there were two points of doubt—one, whether force could be called into operation by the creation of the vacuum, sufficient to overcome the resistance of the soil, and afford a supply of water to the pump; the other, whether, practically, a tube could be driven to a water-bearing stratum of the earth under various conditions of soil, always excluding, of course, rock formations. The general utility of the invention depended upon the result of tests applied to the latter of these points of doubt. A wide range of subsequent experiment might, therefore, well be allowed for such an invention, notwithstanding the circumstance that the first experiment proved that the principle was sound, and could be usefully applied in some circumstances.

Upon this branch of the case, the contention has been, whether Green was the inventor, or Byron Mudge, the person who, under the direction of Green, conducted the early experiments; and a patent issued to Mudge, October 24th, 1865, is set up in the answer. The defendant does not, however, claim under Mudge's patent or under any patent. In fact there is no patent to Mudge, as his original patent was surrendered, and, upon his application for a reissue, a case of interference between him and Green was declared, which, after a severe contest, upon a large amount of testimony, and after careful argument, was decided in favor of Green. No patent to Mudge is, therefore, in this case, nor is Mudge called as a witness. But the defendant contends, as he may rightfully do, that the evidence shows Mudge to have been the inventor, and not Green. I cannot find, upon the evidence, that this

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defence is sustained. On the contrary, it appears quite clearly that the inventor was Green.

A patent to James Suggett is also set up. That, however, is not a patent for a process, but for a combination which does not involve the use of Green's process, and to which Green makes no claim.

The whole question of prior use may at this place be disposed of. The answer sets up, that Green's process had been long before described in Ure's Dictionary of Arts and Manufactures, as well as in McKenzie's Five Thousand Receipts, and had been used in certain wells, constructed prior to the date of his invention, in the towns of Cortland, Ithaca, Dansville, Napierville, and Dexter, and in the salt wells at Syracuse. In respect to a well claimed to have been constructed by Stephen R. Hunter, at his planing mill in Cortland, I am compelled to the conclusion, that no such well was made at the time stated. In respect to the other wells as to which proof is given, a critical examination of the evidence would be here required, if the patent under consideration were considered to be a patent for the mere process of making the pit of a well, without removing the earth upwards. Over these wells there has been an extended controversy as to whether, in any of them, the well pit was constructed without removing the earth upwards. However this may be, it cannot be successfully contended that the evidence affords room to claim that any one engaged in the construction of these wells had, at that time, conceived the idea of using artificial power to force water directly from the earth into a well pit, as a means of obtaining an increased supply of water, or that any one of these wells presents the characteristic feature of Green's method, whereby the above idea is utilized and made practically available to accomplish that result. It becomes unnecessary, therefore, for me to determine whether or not the pit of any of the prior wells was constructed by puncturing or by excavating. The remark already made is also applicable to the evidence given in respect to the manner of sinking the salt wells. Plainly, the salt wells do not anticipate the process



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invented by Green. Nor is his process described in the printed publications set up in the answer; and, upon the evidence, it must be held, that the principle of Green's process was first conceived by him, and by him first made a practical and operative feature in a well.

It is, of course, true, that, prior to Green's invention, water had been pumped from a hole in the ground, and from a small hole. Doubtless, it is also true, that, in some such case, where a pump had been inserted in a small hole, for the purpose of raising therefrom the water found therein, the principle of Green's invention may at times have been called into operation. No such case is here proved; but, if such fact were proved, Green's right to a patent would not thereby be defeated. A chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by putting it to a practical and intelligent use, first makes it available to man.

As bearing upon the question whether the idea claimed to have been conceived by Green, and to have been put to practical use by him in his process, had before that been known and applied, it should also be noticed, that, while the advantages of the process claimed by Green are many and obvious, and, although, since the date claimed for his invention, numerous patents have been issued—some one hundred and fifty, I think, the evidence shows—for instruments to be used in putting down the tubes of such wells, no application for any such patent appears to have been made before that time. Moreover, the invention, when it was announced by Green, was received as a novelty, and, since then, an extensive business of constructing driven wells has sprung into existence, a business of such importance that the number of driven wells since constructed is computed by hundreds of thousands. In this State alone, the number is stated by a witness to be one hundred and fifty thousand and upwards. The change in the art of well

making which the evidence discloses, of itself goes far to prove novelty. Indeed, when it is considered that the methods in use for obtaining a supply of water from the earth are matters of common knowledge, and that a well is a thing of every day use, everywhere, reference may be made to the common knowledge of mankind to show that it has not always been understood that a supply of water may be obtained in almost any place by simply driving down tight in the earth a tight tube and attaching thereto a pump. Even now, it is doubtless a new thing to many, to be told that, if an ordinary well, from which the water is drawn by a pump, be filled up with dirt and the dirt packed tightly about the pump, the productiveness of the well will be thereby increased.

My conclusion upon this branch of the case, therefore, is, that the invention of Green has not been shown to have been anticipated, and is properly claimed by Green as a new and useful invention made by him.

I come now to consider the question of dedication and abandonment, which is presented by the evidence here, and is a question as important as any raised in the case. It is contended that Green, at the time of his invention, dedicated it to the public, and also that he abandoned it as not worthy to be patented. The law pertinent to this branch of the inquiry is the law in force prior to January, 1866. By the patent Act of 1870, as well as by the Revised Statutes, all rights previously acquired were preserved. The law governing here is to be found, therefore, in the Acts of 1836 and of 1839, as those statutes have been interpreted and applied by the Courts.

The facts relied upon as showing a dedication of his invention by Green, are, that he permitted a well made by his process at the Fair Grounds, in Cortland, where the 76th New York regiment, of which he was colonel, was then stationed, to be there publicly used, and that he arranged for providing tubes to be taken with his regiment when it should move, in order to supply it with water when in hostile localities. That these facts do not amount to a dedication, I think, is plain. The occasion which called forth this invention was the rumor

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that the rebels were intending to poison the wells in places where the Union armies might come, and the report that some part of the Union army had been compelled to surrender for want of water. There was supposed to be a necessity for some form of well that would be tight, to prevent the possibility of poison, and that could be constructed quickly, cheaply and easily, so as to be available for a moving army. Under the pressure of this supposed necessity Green conceived the idea of his well, and also devised the method by which that idea could be put to practical use. Once conceived, a very simple experiment would test the soundness of the position he had taken and maintained, in discussions had respecting his plan, that it was possible to force water from the earth into the pit of a well, by using a tube driven tightly into the earth for a well pit, and creating a vacuum therein by a pump attached. This experiment, as the evidence shows, was made under the direction of Green, and in pursuance of the directions he had given, at or near his house in Cortland. The first experiment was a success, in this, that it proved the possibility of obtaining a supply of water by this process; but, of course, it could not prove that a tube could be driven down to a water-bearing stratum in all localities, with the cheapness and dispatch necessary to render the process one of general utility. It was natural, therefore, to suppose, that, before the process could be declared to be satisfactory, other experiments, in other and different localities, should be made. He could, by law, use his invention for this purpose, and permit it to be used, for two years, without forfeiting his right to a patent. Under such circumstances, it would be going far to say, that his act of permitting the use of his process at the camp in Cortland, where his regiment was then in camp, and of providing material wherewith to construct such wells for his regiment when it should move into hostile territory, amounted to a dedication of his invention to public use, and worked a forfeiture of his right to it.

But, it is said, that the patent is invalid under the provision of the Act of 1839. The Act of 1839, as has repeatedly been

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held, has no effect to invalidate a patent, unless there be proof of a use of the invention more than two years prior to the application for the patent, and that such use was with the knowledge and allowance of the inventor. Here, there is no evidence of any use or sale of the invention by Green, prior to his application for a patent. Nor is there any direct proof of knowledge on his part of any such use or sale by others, during that period. There is, however, evidence, that, within two years prior to Green's application, some wells called driven wells were sunk in Cortland, and, as it is claimed, under such circumstances of publicity and locality, as to compel the inference that Green knew of the use of his process in their construction. It cannot be denied that knowledge of the putting down of some of these wells on the part of Green, seems highly probable. Still, there is no direct evidence of such knowledge, and Green denies the knowledge, under oath. Furthermore, two witnesses produced by the defence, who also resided in Cortland, and one of whom was a Justice of the Peace, being asked as to these wells, say that no knowledge of such wells came to them. It seems necessary, therefore, to conclude, that the existence of those wells was not so notorious as to compel the inference that they were known to Green.

Here it may be noticed, also, that wells put down by James Suggett were under a patent issued to him March 9th, 1864, which patent was for a combination of three instruments—an iron perforated tube, a pointed plug to use as a drill, and a pump, (*Haselden v. Ogden*, 3 *Fish. Pat. Cas.*, 378,) and which it is a mistake to suppose necessarily involved the use of the process claimed by Green. It does not, therefore, follow, that knowledge of the fact that Suggett had put down wells in Cortland necessarily amounts to notice that the process of Green was being employed by Suggett. The rule of law being, that "proof of knowledge and acquiescence must be beyond all reasonable doubt, as every presumption is the other way," (*Jones v. Sewall*, 6 *Fish. Pat. Cas.*, 367, Clifford, J.,) I am of the opinion that Green is entitled to the benefit of

the doubt raised by his own oath and the testimony of the two Hunters.

Again, it is contended that the acknowledged fact that Green made no application for a patent till January, 1866, between four and five years after the date of his invention, shows an abandonment of the invention. But, says Woodruff, J.: "Lapse of time does not, *per se*, constitute abandonment. It may be a circumstance to be considered. The circumstances of the case, other than mere lapse of time, almost always give complexion to delay, and either excuse it or give it conclusive effect. The statute has made contemporaneous public use, with the consent and allowance of the inventor, a bar, when it exceeds two years. But, in the absence of that, and of any other colorable circumstances, we know of no mere period of delay which ought, *per se*, to deprive an inventor of his patent." (*Russell and Erwin Co. v. Mallory*, 10 *Blatchf. C. C. R.*, 149.)

In the present instance, the circumstances attending the delay are unusual, and, as I consider them sufficient to excuse a delay which certainly must be deemed extraordinary, a statement of these circumstances seems necessary. I premise the statement by repeating, that, upon the evidence, there is no room to doubt the fact that Green, at the time of his invention, claimed to have made a valuable discovery and to have invented a new process; and, furthermore, that he then declared an intention to secure his process by patent, and expressed his belief that large profits would accrue to him therefrom. At that time, Green, who had been partly educated at West Point, was engaged in organizing a regiment at Cortland, his residence, and was expecting soon to take part in the war of the rebellion. Within a few days after his invention, in the discharge of what seemed to him to be his duty, he felt compelled to shoot one of the captains of his regiment, named McNett. The shot was not mortal, but inflicted serious injury. In the then state of the public mind, this occasion gave rise to intense public excitement, out of which sprang a controversy of extraordinary bitterness, involving numerous persons and continuing

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for several years. The effect upon Green was disastrous in the extreme. He was suspended from his command, then tried by a Court of inquiry, at Albany, and reinstated in command. His regiment, after having, it is said, required the protection of a battery to save it from violence at the hands of evil disposed people of the county, removed to Washington, where Green was relieved from his command, and then dismissed the service, and subjected to military charges. He was, in addition, harassed by civil suits brought to charge him with personal liability for articles used by his regiment. He was also arrested, and then indicted, for the shooting of McNett, and, after repeated postponements of the trial, effected because of the excited state of the public mind, was tried in 1866, and, the jury having disagreed, was discharged. During this period, he also became involved in church difficulties arising out of the shooting of McNett, was expelled from the church and compelled to appeal to the Bishop, and also became involved in litigation with the pastor of his church. His efforts during this period to secure a reversal of the order dismissing him from the service were constant and absorbing, and were attended with such anxiety of mind as to give rise to the charge that he was insane. This state of things continued up to 1866, during which period he was of necessity often absent from Cortland, at Albany and at Washington; and he devoted his entire time to the controversy in which he had become involved, abandoning all other occupation, and exhausting all his means. The pressure of these circumstances was such, that he became discouraged and despondent, and was in fact driven near to madness. The extraordinary nature of the circumstances in which the man was placed during these years is fully proved, by many witnesses of character. These circumstances certainly give complexion to his omission to secure his invention by patent, and serve to furnish a proper excuse for such omission. In regard to a man so circumstanced, it would hardly be safe, in face of his positive oath to the contrary, to infer an intention to abandon an invention which evidently he always considered of great importance. This conclusion is

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strengthened by the uncontroverted fact, that when, in November, 1865, Green saw, by an advertisement in the papers, that driven wells were being put down, although he was advised by counsel defending him on the indictment, not to apply for a patent, as he would thereby increase the number of his enemies, and prejudice himself on the trial of the indictment then about to come on, nevertheless he did then, and in opposition to the advice of his counsel, file his application and assert his right to the invention. I conclude, therefore, that, upon the facts of this case, it must be held that the defendant has not produced that full measure of actual proof which is necessary to sustain the defence of abandonment.

I have now disposed of all the issues which have been seriously contested in this important case. There are several objections taken to the patent as a reissue, but they have not been greatly pressed, and I do not find in any of them ground for declaring the reissue void. I have given to these objections all the attention they appear to deserve, but it seems hardly worth while to extend this opinion by a statement of the reasons which have led me to reject them. I content myself with saying, that I consider the original patent to have been for a process, as is the reissue, and that the process I find described in the reissue is also to be found described in the original patent.

As to the question of infringement, I do not understand that it is disputed. At any rate, it is clearly proved. There must, therefore, be a decree for the complainants, in accordance with the prayer of the bill.

*George Gifford, Milo Goodrich, Benjamin F. Tracy and Joseph C. Clayton, for the plaintiffs.*

*William D. Shipman, Samuel L. Warner and Silas A. Robinson, for the defendant.*

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The United States v. Hirschfield.

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THE UNITED STATES *vs.* WOLF HIRSCHFIELD.

An indictment under § 5512 of the Revised Statutes, for fraudulent registration, alleged, in one count, that the defendant, "having no lawful right to register, fraudulently and wilfully did register," and, in another count, "that he had no lawful right to register, as he well knew, by reason of the fact that he was then and there an alien, and had not been admitted to become a citizen of the United States:" *Held*, that the indictment was bad, in not pointing out the fraud, and in omitting to state facts showing that the defendant was not entitled to register; and that the averment that the accused was an alien and had not been admitted to become a citizen of the United States, did not show that he had no right to register, or that he was not a citizen of the United States, or that he had no right to vote.

(Before BENEDICT, J., Southern District of New York, April 29th, 1876.)

BENEDICT, J. The accused was indicted under section 5512 of the Revised Statutes, for fraudulent registration. He was tried and convicted, and now moves in arrest of judgment. The indictment contains two counts. The first count charges, that, "at a registration of voters for an election for representative in the Congress of the United States, to wit, at a registration then and there conducted for the fifteenth election district of the fourth assembly district of the city of New York, in the said Southern District of New York, made under the laws of the State of New York, for an election at which a representative in Congress might be chosen, he, the said Wolf Hirschfield, otherwise called William J. Hirschfield, having no lawful right to register, fraudulently and wilfully did register, against the peace of the United States and their dignity, and against the form of the statute in such case made and provided." The second count differs from the first in no substantial particular except in stating that the accused "had no lawful right to register, as he well knew, by reason of the fact that he was then and there an alien, and had not been admitted to become a citizen of the United States."



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The United States v. Hirschfield.

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This indictment is claimed, in behalf of the accused, to be insufficient to warrant a judgment thereon, for several reasons: (1.) Because the averment is, simply, that the accused fraudulently registered, without stating any facts to show that a fraud was committed, or to enable the accused to know what he is charged with having done; (2.) Because the election districts and assembly districts of the city of New York are not known to the law, the one being designated by the supervisors, the other by the police commissioners, and neither by any statute; wherefore, it is claimed that the registration is imperfectly described in the indictment; (3.) That the indictment is also defective in omitting to state any facts showing the organization of any board, or the appointment of any officers, authorized to make a registration, and to whom application for registration could be made; (4.) That the averment in the first count, that the accused had "no lawful right to register," is insufficient, because it contains no statement of facts showing that the accused had not such right, and that the averment in the second count is also insufficient, for the same reason; (5.) That, inasmuch as the laws of the State permit every person to register who would be entitled to vote at the ensuing election, this indictment is defective for omitting to aver that the accused was not entitled to vote at the next election.

The first of these objections, which is applicable to both counts, is well taken. The averment that the accused fraudulently registered is insufficient, although those are the words of the statute. Something more must be stated, in order to give the accused any proper notice of the charge which he is to meet. It is impossible for the accused to determine, from this indictment, whether he is required to show, in his defence, that he was twenty-one years of age, or to show that he resided in a certain place, or to show that he bore a certain name, or to show that he was a native, or that he was a naturalized, citizen of the United States. An indictment under this statute should point out the fraud which, it is supposed, the accused committed, so that he can know what it is that he is

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The United States v. Hirschfield.

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called on to explain, and be enabled to prepare his defence. (1 *Bishop's Crim. Pro.*, § 371; *Pearce v. The State*, 1 *Sneed*, 67.)

The indictment is also fatally defective for omitting to state facts showing that the accused was not entitled to register. This omission, which is palpable in the first count, was sought to be cured in the second count, by the averment that the accused was an alien, and had not been admitted to become a citizen of the United States. But, this averment does not show that the accused had no right to register. Some aliens who have never been admitted to become citizens are entitled to vote. Thus, by § 2172, it is provided, that "the children of persons who have been duly naturalized, \* \* \* being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof." Such persons have a right to register, although they are aliens and have never taken any steps towards being admitted to become citizens. They are citizens by virtue of the statute, and are never admitted by any Court, or required to take any proceedings to entitle them to the rights of citizenship. The absence of a lawful right to vote is, by the statute, made a necessary ingredient of the offence, and the necessity to aver and prove such absence of right is conceded. But, the indictment contains no fact showing the absence of such right. It is, therefore, plainly insufficient, and the judgment must be arrested for this reason.

*Benjamin B. Foster*, (*Assistant District Attorney*), for the United States.

*Benjamin F. Tracy*, for the defendant.

THE UNITED STATES *vs.* D. K. OLNEY WINTER.

An indictment, under § 5467 of the Revised Statutes, against an employee in a post office, for stealing money from a letter, did not aver that the letter was one intended to be conveyed by mail, or that it had been deposited in any post office, or in the charge of the defendant, or that it came into his possession in the regular course of his official duty: *Held*, that the indictment was bad.

(Before BENEDICT, J., Southern District of New York, April 29th, 1876.)

BENEDICT, J. The accused was indicted under section 5467 of the Revised Statutes. The indictment contains several counts, but all except the first were *not prossed*, on motion of the District Attorney. Upon the first count a conviction was had and now the accused moves in arrest of judgment, upon the ground that the count upon which he was convicted charges no offence. The count avers, that the accused was clerk and assistant postmaster, and did steal and carry away from and out of a certain letter, (describing it by its direction,) which letter then and there came into his possession, and had not then and there been delivered to the party to whom it was directed, an article of value (describing money.) There is no averment that the letter from which the money was taken was a letter intended to be conveyed by mail, or that it had been deposited in any post office, or in the charge of the accused, or that it came into his possession in the regular course of his official duty. In order to sustain the indictment, it has, therefore, been argued, and necessarily, that the act of stealing money from out of a letter, whenever committed by a person employed in the postal service, is an offence against the United States, whether the letter be at the time in the charge of the United States or not. It is not to be denied, that the language of the clause in section 5467, upon which this indictment is framed, affords room for such an argument; for, while, in the first part of the section, where the offence of stealing a letter

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The United States v. Winter.

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is created, the provision requires that the letter should be one intended to be conveyed by mail, or to be carried or delivered by some person employed in the postal service, or forwarded through or delivered from some post office, in the clause under consideration, the letter is described simply as a letter "which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever." But, it cannot be supposed that it was intended, by this clause, to protect the contents of any letters other than such as come within the jurisdiction of the United States, and for the safety of which the United States is responsible, by reason of a deposit thereof in some post office, or in charge of some person employed in the postal service; and this is indicated by the provision in this same clause, which excludes from the provision any letter after its delivery to the person to whom it is directed. No reason is suggested for this exception, if it was intended to protect all letters, whether in charge of the United States, or not. The clause must, therefore, be understood as if express reference had been made to the description given in the first part of the section, and as having application, therefore, only where the letter from which the money is abstracted was intended to be conveyed by mail, or to be carried or delivered by a mail carrier, or other person employed in some department of the postal service, or forwarded through, or delivered from, some post office. If this be the true construction to be placed upon the clause of the statute under which this indictment is framed, it is necessary to insert in the indictment an averment showing that the letter from which the money was taken was intended to be conveyed by mail, or carried or delivered by some employee of the postal service, or to be forwarded through, or delivered from, some post office. The first count of this indictment, upon which alone a verdict was asked and taken, contains no such averment. For all that appears, the letter in question might have been a letter never sent, or intended to be conveyed, by mail, or in any other way placed in the charge of the post office department—picked up, it may be, in the

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The United States v. Jenther.

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street by the accused. This omission of a necessary ingredient of the offence is a fatal defect, and compels an arrest of the judgment.

*Benjamin B. Foster*, (*Assistant District Attorney*), for the United States.

*Ambrose H. Purdy*, for the defendant.

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THE UNITED STATES *vs.* ALBERT K. JENTHER.

Under section 5467 of the Revised Statutes, an indictment against a letter-carrier for embezzling a letter entrusted to him as a carrier, to be carried and delivered by him, is not defective, although it does not aver that the letter had not been delivered to the party to whom it was directed.

That section creates, first, offences appertaining to letters, and, next, offences appertaining to the contents of letters, and then contains this proviso: "and provided the same shall not have been delivered to the party to whom it is directed." *Semble*, that such proviso does not apply to the first class of offences. If, however, it does, it is for the accused to prove the delivery, as a defence.

An indictment under said section described the letter embezzled thus: "a letter enclosed in an envelope, addressed and described as follows, that is to say, to M. D., No. 122 W. 26 *St.*, a more particular description of the manner in which said envelope was directed being to the jurors unknown, said envelope having been destroyed:" *Held*, that it was competent to give evidence relating to a letter contained in an envelope directed "M. D., No. 122 W. 26th *Street*," the word *to* and the abbreviation *St.* not being on the envelope, the variances not being material.

On a motion by the defendant for a new trial on an indictment, on the ground that the evidence failed to sustain a particular allegation in the indictment, it ought to appear that the objection was made at the trial in a manner sufficiently formal to attract attention.

(Before BENEDICT, J., Southern District of New York, April 29th, 1876.)

BENEDICT, J. The accused was indicted under section 5467 of the Revised Statutes, charged with embezzling a letter entrusted to him as a carrier, to be carried and delivered by him. Having been found guilty, he now moves in arrest of the judgment, and also for a new trial. The main ground of the motion in arrest of the judgment is, that the indictment is defective, in that it contains no averment that the letter had not been delivered to the party to whom it was directed, it being supposed that the statute makes it necessary for the prosecution to aver and prove such negative fact.

The section under which the indictment is framed is devoted to the creation of two kinds of offences—one appertaining to letters, the other to the contents of letters. In creating the offence of embezzling letters, the statute describes the subject of the offence as a letter intended to be conveyed by mail, or to be carried or delivered by a mail carrier, mail messenger, route agent, letter carrier, or other person employed in a department of the postal service, or forwarded through or delivered from any post office, and which shall contain an article of value. This portion of the section is, to all appearance, complete, and there is nothing in it to indicate that it does not state all the ingredients of the offences intended to be created thereby.

The statute then passes to another subject, namely, the contents of letters, and creates certain offences in respect thereto. In this part of the statute occurs the proviso: "and provided the same shall not have been delivered to the party to whom it is directed." If it be true that the proviso is intended to be applicable to the offences created by the first part of the section, as well as to those created by the part of the section to which it is appended, still it is not so connected with the description of the offences relating to letters as to compel its insertion in an indictment. The offence of embezzling a letter, as created by the statute, can be fully set forth without including the proviso, for, the proviso is not incorporated into that portion of the statute, but is separated from it by a provision relating to a different subject-matter. The

general rule is, that, if there be any description in the negative, the affirmation of which would be a defence, the proof of it lies on the defendant, and it need not be stated. (*Rea v. Baxter*, 5 T. R., 33.) This rule is properly applied in the case of a letter carrier charged with the embezzlement of a letter entrusted to him to be carried and delivered. The delivery of the letter would be a defence, and the fact of delivery peculiarly within the knowledge of the person charged with such delivery.

Moreover, this indictment charges an embezzlement by the letter carrier of a letter entrusted to him to be carried and delivered. The fair and plain implication here is, that no delivery of the letter had been made. Upon this ground, also, the indictment can be sustained.

The motion in arrest of judgment must, therefore, be denied.

The motion for a new trial raises a question of variance. The indictment describes the letter embezzled in the following manner: "a letter enclosed in an envelope, addressed and directed as follows, that is to say, to Mary Dilsworth, No. 122 W. 26 St., New York city—a more particular description of the manner in which said envelope was directed being to the jurors unknown, said envelope having been destroyed." This description is varied slightly in different counts of the indictment. The evidence to the admission of which objection is taken related to a letter contained in an envelope directed, "Mary Dilsworth, No. 122 W. 26 Street, New York city," the only variance being, that the word "to," placed before "Mary Dilsworth," in the indictment, was not upon the letter, and the abbreviation "St.," given in the indictment, was not upon the letter, but, instead, the word "Street" was written out in full. Neither of these variances is material. The sense is the same. No word is changed, nor any word important to the sense omitted. Besides, the indictment states that the envelope is lost, and that such loss prevents a more particular description of the manner in which the letter was addressed; and, although the phraseology adopted in this particular is not happy, still it may properly, I think, be held to

convey the idea, that exactness in the direction stated was not intended, not being possible, as the envelope was lost. It may, also, be said, that the introduction of the preposition "to," before the name, together with the accompanying statement of loss of the direction, notwithstanding the use of the words "as follows," shows that it was the intention of the pleader not to set out the direction, but only to describe the person to whom the letter was addressed. These reasons are sufficient to dispose of the question of variance.

The only remaining ground of objection to the verdict is, that the evidence failed to show that the letter contained an obligation and security of the United States, as averred in the indictment. The witness testified, that she placed in the letter three dollars, in one dollar bills. The District Attorney is confident that the witness also said the bills were national bank bills. This the defendant's counsel denies, and I am unable, from my notes or recollection, to say which is right. But, this is certain, no such point was called to my attention on the trial. A general objection was made, that the averment of the indictment in respect to the contents of the letter had not been proved; but, it was replied, that the letter had been proved to contain three one dollar bills. There may, also, have been something said about the necessity of proving that the bills were bills of the United States, but, I am certain the objection now made, that, upon the evidence, the bills may have been bills of some State bank, and so not obligations of the United States, as averred in the indictment, was not brought to my consideration at the trial. Such an objection, if intended to be relied on, should have been made in a manner sufficiently formal to attract the attention of the Court, and when the omission, if it existed, could, beyond reasonable doubt, have been cured. Made first at this time, in any formal manner, it is justly to be disregarded.

The motion for a new trial is, for these reasons, denied.

*Benjamin B. Foster*, (Assistant District Attorney,) for the United States.

*Ambrose H. Purdy*, for the defendant.



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In re The Shipping Commissioner of the Port of New York.

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*In re* THE SHIPPING COMMISSIONER OF THE PORT OF  
NEW YORK.

Under the Act of June 7th, 1872, (17 U. S. Stat. at Large, 262,) authorizing the appointment of shipping commissioners, (now Title 53 of the Revised Statutes,) although it is provided that "the salary, fees and emoluments" of a commissioner shall not be more than \$5,000 *per annum*, and that "any additional fees shall be paid into the Treasury of the United States," and that the commissioner may engage clerks "at his own proper cost," and that he shall lease, rent or procure premises "at his own cost," yet the necessary and proper expenses of his office for clerk hire, and rent of premises, and other matters are first to come out of the fees he receives, and then he may retain, as his emolument, out of such fees, \$5,000 *per annum*, and then any of the fees which remain are to be paid into the Treasury.

(Before JOHNSON and BLATCHFORD, JJ., Southern District of New York, May 11th, 1876.)

BLATCHFORD, J. A reference having been made by the Court to one of the masters thereof to examine and pass the accounts of the shipping commissioner for the port of New York, and to report to the Court in reference thereto, he reports that the said shipping commissioner has rendered accounts of the receipts and expenditures of his office from August 8th, 1872, to January 1st, 1876, duly verified, and which are in great detail and comprise a vast number of items, each item of disbursement being accompanied by its corresponding voucher; that it appears, from such accounts, that the receipts of the shipping commissioner's office were, from August 8th, 1872, to January 1st, 1873, \$20,303 50—from January 1st, 1873, to January 1st, 1874, \$37,765 15—from January 1st, 1874, to January 1st, 1875, \$54,826 00—from January 1st, 1875, to January 1st, 1876, \$50,459 00; and that the expenditures were, from August 8th, 1872, to January 1st, 1873, \$20,954 50—from January 1st, 1873, to January 1st, 1874, \$38,534 25—from January 1st, 1874, to January 1st, 1875, \$53,243 78—from January 1st, 1875, to January 1st, 1876,

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\$51,114 04; and that he has not taken any testimony or made any examination as to the propriety or necessity of the various items of expenditure charged, for the reason that the question meets him *in limine*, whether the shipping commissioner is "authorized, under the Act of Congress which creates his office, to apply to the payment of rent, clerk hire and the other necessary expenses thereof, the fees by him received in excess of the sum of \$5,000," or whether all of the expenses necessarily incident to the conduct of his office are "to be paid out of the sum of \$5,000 which the Act gives him as his salary or compensation." The master also reports, that the only provisions of law which he has been able to find relating to the question are in title 53 of the Revised Statutes of the United States, chapter 1, sections 4505, 4507, and 4594; and that, therefore, before making any further investigation into, or report upon, the shipping commissioner's accounts, he submits to the Court for interpretation the sections above mentioned, that he may then, if required, proceed further, in the light of its decision.

The shipping commissioner for the port of New York was appointed under the provisions of the Act of June 7th, 1872, (17 *U. S. Stat. at Large*, 262,) entitled "An Act to authorize the appointment of shipping commissioners by the several Circuit Courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen." The 1st section of that Act provides, that "the several Circuit Courts of the United States, in which Circuits there is a seaport or seaports for entry, shall appoint a commissioner for such seaport within their respective Circuits, as, in their judgment, may require the same, and which shall also be ports of ocean navigation; such commissioners to be termed 'shipping commissioners;' and may, from time to time, remove from office any of the said commissioners whom it may have reason to believe does not properly perform his duties; and shall provide for the proper performance of such duties until another person is duly appointed in his place; shall regu-

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late the mode of conducting business in the shipping offices to be established by the shipping commissioners, as hereinafter provided ; and shall have full and complete control over the same, subject to the provisions herein contained." The provisions of such 1st section are now to be found in section 4501 of the Revised Statutes. Under these provisions the present shipping commissioner for the port of New York was duly appointed in July, 1872, by the Circuit Court of the United States for the Southern District of New York.

The 2d section of the Act requires, that "every shipping commissioner so appointed shall enter into bonds to the United States, conditioned for the faithful performance of the duties required in his office," and that he shall take and subscribe, "before entering upon the duties of his office," an oath, the form of which is set forth in the section, and which is an oath that he will "support the Constitution of the United States," and "truly and faithfully discharge the duties of a shipping commissioner," to the best of his ability and according to law. The commissioner in question gave such bond and took such oath. The provisions of such 2d section are now to be found in section 4502 of the Revised Statutes.

The 3d section of the Act provides, that "every shipping commissioner may engage a clerk or clerks to assist him in the transaction of the business of the shipping office, at his own proper cost, and may, in case of necessity, depute such clerk or clerks to act for him in his official capacity ; but the shipping commissioner shall be held responsible for the acts of every such clerk or deputy, and will be personally liable for any penalties such clerk or deputy may incur by the violation of any of the provisions of this Act ; and all acts done by a clerk, as such deputy, shall be as valid and binding as if done by the shipping commissioner. Each shipping commissioner shall provide a seal with which he shall authenticate all his official acts, on which seal shall be engraved the arms of the United States and the name of the seaport or district for which he is commissioned. Any instrument, either printed or written, purporting to be the official act of a shipping com-

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missioner, and purporting to be under the seal and signature of such shipping commissioner, shall be received as *prima facie* evidence of the official character of such instrument, and of the truth of the facts therein set forth." The provisions of such 3d section are now to be found in sections 4505 and 4506 of the Revised Statutes.

The 4th section of the Act provides, that "every shipping commissioner shall lease, rent, or procure, at his own cost, suitable premises for the transaction of business, and for the preservation of the books and other documents connected therewith, and which premises shall be styled 'the shipping commissioner's office.' And the general business of a shipping commissioner shall be, first, to afford facilities for engaging seamen, by keeping a register of their names and characters; secondly, to superintend their engagement and discharge, in manner hereinafter mentioned; thirdly, to provide means for securing the presence on board at the proper times of men who are so engaged; fourthly, to facilitate the making of apprenticeships to the sea service; and to perform such other duties relating to merchant seamen and merchant ships as are hereby, or may hereafter, under the powers herein contained, be committed to him." The provisions of such 4th section are now to be found in sections 4507 and 4508 of the Revised Statutes.

The 5th section of the Act provides, that "such fees, not exceeding the sums specified in the table marked 'A,' in the schedule hereto annexed, shall be payable upon all engagements and discharges effected before shipping commissioners as hereinafter mentioned, and such shipping commissioners shall cause a scale of the fees payable to be prepared, and to be conspicuously placed in the shipping office; and the shipping commissioner may refuse to proceed with any engagement or discharge, unless the fees payable thereon are first paid." Table A in the schedule is as follows: "Scale of fees for matters transacted at shipping commissioners' offices: First. Fee payable on engaging crew, for each member of the crew, (except apprentices,) \$2 00. Secondly. Fee payable on dis-

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charging crew, for each member of crew discharged, 50 cents." The provisions of such 5th section and table A are now to be found in section 4592, and table C in the schedule annexed to title 53 of the Revised Statutes.

The 6th section of the Act provides, that "every owner, consignee, agent, or master of a ship, engaging or discharging any seamen or seaman in a shipping office, or before a shipping commissioner, shall pay to the shipping commissioner the whole of the fees hereby made payable in respect of such engagement or discharge, and may, for the purpose of in part reimbursing himself, deduct, in respect of each such engagement or discharge, from the wages of all persons (except apprentices) so engaged or discharged, and retain, any sums not exceeding the sums specified in that behalf in the table marked 'B' in the schedule hereto annexed." Table B in the schedule is as follows: "Sums to be deducted from wages of seamen in the partial repayment of the fees payable in table A: In respect of engagements, from the wages of each member of the crew, 25 cents. In respect of discharges, from the wages of each member of the crew, 25 cents." The provisions of such 6th section and table B are now to be found in section 4593, and table E in the schedule annexed to title 53 of the Revised Statutes.

Section 7 of the Act provides, that "any shipping commissioner, or any clerk or employee in any shipping office, who shall demand or receive any remuneration whatever, either directly or indirectly, for hiring or supplying any seaman for any merchant ships, excepting the lawful fees payable under this Act, shall, for every such offence, incur a penalty not exceeding two hundred dollars." The provisions of such 6th section are now to be found in section 4595 of the Revised Statutes.

The Act then goes on to prescribe, in a large number of sections, the details of the business of the shipping commissioner, being details of the general business mentioned in the 4th section of the Act. The commissioner is required to aid in apprenticing boys to the sea service, receiving a fee of \$5

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from the master or owner for each boy bound, including the indenture; to see that shipping agreements are signed in his presence; to see that seamen are discharged, and their wages are paid, in his presence; to make awards between master and seaman, on matters submitted to him; to examine as to provisions and water on board of vessels; and to take charge of the effects and wages of deceased seamen.

The 66th section of the Act then provides as follows: "That in no case shall the salary, fees, and emoluments of any officer appointed under this Act be more than five thousand dollars *per annum*; and any additional fees shall be paid into the Treasury of the United States." The provisions of such 66th section are now to be found in section 4594 of the Revised Statutes.

It is apparent that the principal scheme of the Act in question was to provide a system of engaging and discharging seamen, under the supervision of a shipping commissioner, which should afford protection to seamen, and facilities to masters and owners of vessels. It provides for written shipping articles to be signed by all seamen in the presence of a shipping commissioner; that wages shall be advanced to seamen only in the presence of the shipping commissioner; and that, at the end of a voyage, a seaman shall be discharged and paid off only in the presence of the shipping commissioner. For the shipping and the discharge of seamen the fees above named are to be paid by the owner or master of the vessel to the shipping commissioner, who is to keep them, and one-eighth of the shipping fees and one-half of the discharging fees are to be retained by the master or owner out of the wages of the seaman. In return for so much of the fees as the master or owner does not get back from the seaman, facilities for procuring seamen are furnished by the shipping commissioner in the register he is to keep of the names and characters of seamen, and in the means he is required to provide for securing the presence on board of vessels, at the proper time, of seamen for whom he makes engagements. In return for so much of the fees as the seaman pays, he has the protection afforded by the various provisions

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of the statute. The statute also contemplates that clerks may be necessary to assist the shipping commissioner in the transaction of the business of the shipping office; that such clerks are to be paid; that suitable premises for the transaction of the business of the office, and for the preservation of the books and other documents connected therewith, are to be leased, rented, or procured; that the expense of such premises is to be paid for; that registers of the names and characters of seamen are to be kept; that a register of indentures of apprenticeship is to be kept; and that various documents and certificates may be necessary to be prepared and given by the shipping commissioner. As the statute provides that "the salary, fees, and emoluments" of any officer appointed under it shall not be more than \$5,000 *per annum*, and that "any additional fees shall be paid into the Treasury of the United States," it is contended, on the part of the United States, that the shipping commissioner must pay into the Treasury of the United States all fees received by him in excess of the sum of \$5,000, and must, therefore, pay out of such sum of \$5,000 all the expenses of his office, for clerk hire and rent of premises, and other matters. It is further contended that this view is fortified by the provision in section 3 of the Act, that the commissioner may engage clerks "at his own proper cost," and by the provision in section 4 of the Act, that he shall lease, rent, or procure premises, "at his own cost."

The Act, as passed, provides, in its first 65 sections, for the performance of certain duties by the shipping commissioner and for the taking by him of certain fees for the performance of some of those duties. Many duties are prescribed to be performed by him for which no specific fee is to be paid. The only fees to be paid to him are for engaging and discharging seamen and for apprenticing boys. So far as the first 65 sections are concerned, he may retain all of those fees. If he does, as he must have clerks and an office and books and printed blanks, and make other expenditures in discharging properly the duties imposed on him by the Act, he must pay

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for these things out of such fees, and only the surplus left can go to him as salary or emolument. If the fees are not sufficient to pay for these things, not only will he have no emolument, but he must, in addition, pay for these things out of other resources, if he has and provides for these things. It is meaningless to say to him, in the statute, that, as between himself and the fees, he may pay for these things out of the fees or out of his private resources other than the fees. He could do so, without the statute. The true meaning of the provisions as to "his own proper cost" and "his own cost" is this: The United States were creating an office and providing for the appointment of an officer, who was to be an officer of the United States, appointed by a Court of law, within the provision of subdivision 2 of section 2 of article 2 of the Constitution, and to give a bond to the United States, and to take an oath of office, and have a seal engraved with the arms of the United States. Duties were imposed upon such officer of such a character as to make it necessary that he should have a permanent place of business, with clerks therein, and books of record open to be consulted at all times. It would, therefore, seem proper that the United States should pay out of the Treasury the salary of the officer, and the expense of clerks and premises and books. Instead of that, a system of fees is established, which fees the officer is to receive, and it is provided that the officer shall, at his own cost, as such officer, having such fees of office, pay out of such fees, which otherwise would be his own, the expenses referred to, and that such expenses shall not be a charge on the Treasury of the United States. As regards such Treasury, such expenses are at the proper cost of the office and of the officer, if they are paid out of the fees of the office. The commissioner must, indeed, see to it that the expenses do not exceed the fees; because, as to any such excess, no claim can exist against the United States. Congress had prescribed fixed fees, and no compensation beyond such fees and no other fees than those prescribed were authorized. Yet, it might happen that the fees would amount to such a sum over the expenses as to leave an improperly large surplus as



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emolument to the commissioner. Hence, at the close of the Act, it is provided, in the 66th section, that the salary, fees and emoluments of any commissioner shall not be more than \$5,000 *per annum*, and that any surplus beyond that sum shall be paid into the Treasury of the United States. Unless it be the proper construction of the Act, that the expenses are first to come out of the fees, and that then the commissioner is to be allowed to retain, as his emolument, \$5,000 *per annum* out of the fees, and that then any of the fees which remain are to be paid into the Treasury, it follows, that the only proper construction of the 66th section must be, that, when the commissioner has received fees up to the amount of \$5,000, he must pay into the Treasury the fees thereafter received. This would, in respect to the aggregate amount of fees set forth in the report of the master as received by the commissioner from August 8th, 1872, to January 1st, 1876, namely, \$163,353 65, require the payment into the Treasury of probably over \$145,000, while the commissioner would probably have nothing for his own emolument. Certainly, in every seaport where the duties of the commissioner are onerous, he would have less compensation than in a seaport where his duties are light. Such results would, of course, render the Act wholly inoperative. A construction which would lead to such results ought not to be adopted unless it is clear that no other construction is possible. The construction contended for on the part of the United States would defeat the plain intention of the statute. Well settled principles in the construction of statutes have established the propositions, that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and that a thing which is in the letter of a statute, is not within the statute, unless it be within the intention of the makers. The Act in question is not a revenue law. There is in it no intention manifested to raise any revenue for the United States out of the fees to be paid under it. It is entirely consistent with its scope and purpose, that Congress designed that the system established by it should be self-sustaining as to expenses and emoluments, and that any

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surplus thereafter of fees should be paid into the Treasury, in order that Congress might, in view of the amount, if any, of such surplus, so readjust the fees as to make the system no more than self-sustaining.

It follows, that the proper construction of the provisions referred to is, that the shipping commissioner is authorized to apply to the payment of necessary and proper rent, clerk hire and other expenses, the fees received by him, and that such expenses are not to be paid out of the sum which the statute allows for his salary or emolument. Of course, the question of the necessity and propriety of any payments made by him for such expenses is one not now considered, but it is one to be considered by the master and reported upon by him and finally determined by the Court, under the general power of regulation and control given to it by the 1st section of the Act.

An order will be entered to the above effect, to be settled on notice.

JOHNSON, J. I concur in the opinion of Judge Blatchford.

*George Bliss, (District Attorney,) for the United States.*

*Erastus C. Benedict and Robert D. Benedict, for the shipping commissioner.*

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The Webster Loom Company v. Higgins.

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## THE WEBSTER LOOM COMPANY

vs.

## ELIAS S. HIGGINS AND OTHERS. IN EQUITY.

In a suit in equity on a patent, the defendant, more than one year after the plaintiff's proofs were closed, moved to amend the sworn answer, by averring, on information and belief, that the patented invention was in public use for more than two years before the patent was applied for, and that it was described in a prior patent granted by the United States. The only excuse offered for not inserting the first defence in the original answer was, that the counsel who prepared such answer was under the impression that the suit was subject to the law as it stood prior to the patent Act of July 8th, 1870. As to the second defence, the excuse was, that such counsel had no knowledge or information of any description in any patent prior to the plaintiff's, of a certain device: *Held*, that the motion must be denied.

(Before JOHNSON, J., Southern District of New York, May 13th, 1876.)

JOHNSON, J. The answer in this case was sworn to on the 4th of September, 1874, a replication was filed, and the complainant's proofs were taken and were closed on the 9th of October in that year. On the 30th of December, 1875, the defendants gave notice of the present motion to amend their former answer, by interposing two new defences. They seek to aver, on information and belief, that the complainant's alleged invention was in public use for more than two years prior to the application for the letters patent to Webster, and and that the same is described in letters patent of the United States, granted to William Weild, dated January 13th, 1857, and numbered 16,415.

The only excuse offered for the omission to insert the first of these proposed defences in the original answer is found in the affidavit of the defendants' counsel who prepared the answer, that, when he prepared it, he omitted to state the fact now proposed to be inserted, because he was under the impres-

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sion that the suit was subject to the law as it stood prior to the Patent Act approved July 8th, 1870. He does not say that his impression has since changed, although that may, perhaps, be inferred from his present motion; nor is it claimed that the facts were not known at the time when the answer was interposed. If the suit is governed, in the respect in question, by the Act of July 8th, 1870, or by the equivalent provision of the Revised Statutes, and if the law is, that a public use in this country for more than two years before the application of an inventor for a patent, bars his right to a patent, or avoids the patent after it has been granted, irrespective of his consent to, or acquiescence in, such use, then I think that a party who wishes to avail himself of such a defence, ought, under all ordinary circumstances, to do so at the earliest opportunity. If he fails to do so, something more must be established than that he has been guilty of laches, to induce a Court to excuse his neglect and allow so harsh a defence to be interposed.

Nor do I think the defendants entitle themselves to be now allowed to interpose the other defence proposed. The patent they seek to set up as an anticipation of the Webster patent they owned for a number of years and until it expired. They must be taken to have known its specification and claims. Their counsel does not state that he was not acquainted with the patent, nor that he had not, before the answer was put in, examined and considered the specification. His statement falls very far short of that. It is, that, when he prepared the answer, he had no knowledge or information of any description in any patent prior to the patent on which the suit is brought, of a cylinderwire motion such as is referred to in the affidavits of Duckworth and Hicks. He does not say that he has any such knowledge now, nor give the Court any reason to consider that he finds in that patent what the two affiants, Duckworth and Hicks, are understood to say they conceive to be described there. These persons also base their statements upon the ground of a particular construction to be put on a claim in the Webster patent, which the plaintiffs do not assert and have not asserted, and which seems to me quite

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incapable of being maintained. I am of opinion, therefore, that justice does not require that the amendment should be permitted to be made, in view as well of the laches which has occurred, as of the substance of the amendment itself.

The motion to amend the answer must be denied.

*Clarence A. Seward*, for the plaintiff.

*George Gifford*, for the defendants.

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JOHN H. PLATT, AS ASSIGNEE IN BANKRUPTCY OF THE STUY-  
VESANT BANK, A BANKRUPT

vs.

OLIVER H. P. ARCHER. IN EQUITY.

A. was appointed receiver of an insolvent corporation, by a State Court. The corporation being afterwards adjudicated a bankrupt, the assignee in bankruptcy, in this suit against A., obtained a decree that the appointment of A. as receiver, and the transfer thereby of the property of the corporation to him, was void, as against the rights of the plaintiff under the bankruptcy Act, and that A. must account to the plaintiff for the property. In taking such account, *Held*,

- (1.) The services of attorney and counsel were properly and necessarily rendered to A., as receiver, so far as such services benefitted and preserved the estate, and were not hostile to the proceedings in bankruptcy;
- (2.) Nothing can be allowed to A., out of the fund, for the services of his counsel in this suit, or in reference to the bankruptcy proceedings, he having unsuccessfully resisted such proceedings, or in the matter of the accounting of A. before the State Court, which took place after this suit was brought, or for the referee's fees in such accounting.

(Before BLATCHFORD, J., Southern District of New York, May 22d, 1876.)

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BLATCHFORD, J. In disposing of the exceptions to the master's report, I held that the services of attorney and counsel were properly and necessarily rendered to the defendant, as a receiver appointed by the State Court, of the property of the insolvent corporation, so far as such services "benefitted and preserved the estate of the corporation, and were not hostile to the proceedings in bankruptcy." I also held that "the principle on which allowances for such services out of a fund in Court, or in the hands of an officer of the Court, are made, and the only principle upon which they can be supported, is, that the services rendered were rendered for the benefit of the fund." I also held, that nothing could "be allowed the defendant out of the fund for the services of his counsel in this suit;" that "the services in reference to the bankruptcy proceedings, and to this suit, were services in hostility to the fund, not for its benefit, and were unsuccessful;" and that "whatever claim the defendant might have had upon the assets in his hands as receiver in the State Court, for reimbursement of his expenses for the services of counsel out of such assets, if he had successfully resisted the bankruptcy proceedings and this suit, this Court has no right to divert the fund to pay the expenses of such unsuccessful resistance." I regard these principles as established by the weight of authority in like proceedings under the bankruptcy Act. (*Street v. Dawson*, 4 *Nat. Bkcy. Reg.*, 207; *In re Stubbs*, *Id.*, 376; *Burkholder v. Stump*, *Id.*, 597; *In re Cohn*, 6 *Id.*, 379; *In re Hope Mining Co.*, 7 *Id.*, 598.)

I am earnestly pressed, however, to allow to the defendant, out of the fund, all the expenses he has incurred for the services of attorney and counsel in resisting the bankruptcy proceedings and in defending this suit. It is contended, for the defendant, that, having been appointed receiver by a Court of the State, he has been compelled, as a part of the execution of such trust, to have the services of attorney and counsel down even to the present time; that he has been guilty of no breach of his trust, and has committed no fraud in fact, but has only done what was voidable, as in legal fraud

of the bankruptcy Act; and that a trustee is always to be reimbursed out of the trust fund for his expenses incurred *bona fide* in the execution of his trust.

It is not possible to recognize any legal distinction, under the bankruptcy Act, between the position of a person who is appointed a receiver by a State Court, and, in accepting such trust, makes himself amenable to the provisions of law which prohibit certain transfers, and a person who makes himself amenable to such provisions in any of the other ways specified in the statute, such as becoming a vendee, assignee or transferee by a direct sale, assignment or transfer from the insolvent debtor. The transferee is a voluntary transferee, whether he be appointed by a State Court or by the insolvent debtor, and he takes upon himself the risk of the impeachment of the transfer by an assignee in bankruptcy. The right and title of the assignee in bankruptcy are paramount, and, although the transfer which he attacks was not void, but only voidable, yet, when the assignee in bankruptcy succeeds in his suit to set aside the transfer, it necessarily follows, that, from and after the commencement of the suit, the resistance of the transferee was wrongful, as against the assignee in bankruptcy, and as against the fund which becomes his as of the time of the commencement of the suit. The fund which may have been, up to that time, a trust fund in the hands of the transferee, by virtue of his trust appointment, ceases from that time to be held in his hands by virtue of such trust appointment, and, from that time, passes out from under such trust appointment. The decree in the suit, so far as such trust appointment is concerned, relates back to the commencement of the suit, and, from that time, the fund becomes a trust fund in the hands of the assignee in bankruptcy, under his trust appointment. Therefore, in such case, there is not, after the commencement of the suit, any trust fund for the defendant to administer, as between himself and the authority which created such trust, and no trust fund out of which such authority can reimburse to him his expenses incurred after that time. All his expenses after that time are incurred to diminish a fund which

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is, in judgment of law, the property of another and a hostile trustee. If the doctrine contended for were to be admitted, there would be little benefit to be derived, in many cases, from the provisions of the statute in respect to prohibited and fraudulent transfers, for, the expenses of all parties to the hostile proceedings to set aside such transfers would, if to be paid out of the fund, leave but a scanty residuum for the creditors, and encouragement would be offered for the incurring of needless expenses.

So, too, the expenses of the defendant for the services of counsel in resisting the bankruptcy proceedings cannot be regarded as expenses incurred for the benefit of that fund in the hands of the assignee in bankruptcy, out of which it is now asked that such expenses should be paid. Such expenses had no tendency to make such fund larger, but, if now paid, they will make it smaller. They were not expenses incurred to ensure the passing over of the fund intact to the party now adjudged to be entitled to it, or to preserve the fund from the hostile attacks of those who were seeking to prevent the fund from passing to the assignee in bankruptcy.

There is nothing in these views that is inconsistent with the well established principles in regard to trustees, that their expenses in protecting the trust property against unsuccessful hostile attacks, shall, in case of a distribution under the trust, be paid out of the fund; and that their expenses in protecting and administering the trust property shall, even in the case of a successful hostile attack, be paid out of the fund, so far as they were incurred prior to the commencement of the hostile suit. Nor is there anything inconsistent with the principle of such cases as *Poole v. Pass*, (1 *Beavan*, 600,) and *Holford v. Phipps*, (4 *Id.*, 475,) which proceed upon the ground that the defendant to whom expenses and costs are allowed was a trustee for the plaintiff. In setting aside a transfer which the statute declares "shall be void," and was made "in fraud" of its provisions, and "contrary" to its provisions, the transferee can, in no proper sense, be regarded as a trustee for the plaintiff, within the sense of the decisions which give costs and



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expenses to a defendant who is a trustee for the plaintiff, in some cases where the plaintiff has a decree in his favor.

I find it stated in the affidavit of Mr. Archer, now presented, that this suit was commenced March 12th, 1872. This is, I think, a mistake. I stated the date, in my former opinion, as being May 11th, 1872. I think that is correct, as the bill was filed May 10th, 1872, and the subpoena was, I believe, served the next day. The defendant claims that, as receiver appointed by the State Court, he did not, under the order made by this Court, on the 6th of June, 1872, appointing the plaintiff receiver in this suit, turn over to the latter the assets in question until June 12th, 1872, and that he was obliged to retain such property until that time, and to employ attorneys and counsel until that time. But, no time can properly be taken as the dividing line, as respects this suit, between unquestioned possession by the defendant and hostile action by the plaintiff, other than the commencement of the suit, and, from that time, as against any claim on the funds for the services of counsel, the defendant took the risk of an adverse result in the suit of which he then had full notice. The same rule must apply to the services of attorney and counsel in the matter of the accounting of the defendant before the State Court, which took place after this suit was brought. The observations of Judge Cadwalader on this subject, in *Burkholder v. Stump*, (4 *Nat. Bkry. Reg.*, 597), where he refused an allowance of this kind, meet my approval. These views make it necessary that I should hold, also, that the items of referee's fees for accounting in the Supreme Court are not allowable.

As regards any suits or matters in which, on the request or retainer, express or implied, of the plaintiff, the services of attorney and counsel were rendered for the benefit of the estate, either before or after the commencement of this suit, whether such suits or matters were prosecuted in the name of the defendant or otherwise, of course, such services must be paid for by the plaintiff out of such estate.

I do not perceive that any departure from the principle I have adopted can be properly predicated upon the fact that the

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plaintiff may, in the course of the proceedings before the master, have made claims which the master disallowed.

The defendant put in an answer in this case denying the plaintiff's title and his right to recover. There was a decree for the plaintiff, on proofs, and then an accounting. Costs to the plaintiff would properly follow a recovery on such accounting, and, as a general rule, the defendant would be required to pay the fees of the master on such accounting. The plaintiff proposes that the master's fees for his services in this cause, not already paid for, shall be taxed by the clerk, upon notice to the respective parties, and that one half of the amount thereof, as taxed, shall be paid by each party. I see no reasonable objection to this provision.

The order on the master's report and exceptions may be again presented for settlement, so that it may conform to this decision where that modifies the one before rendered.

*Francis N. Bangs*, for the plaintiff.

*David Dudley Field* and *Dudley Field*, for the defendant.

## HENRY L. DALTON AND OTHERS

vs.

## CHARLES NELSON AND OTHERS. IN EQUITY.

The reissued letters patent granted to Oscar T. Earle, assignee of Albert Bisbee, June 14th, 1870, for a compression steam gauge cock, (the original patent having been granted to said Bisbee, September 18th, 1855, and extended for seven years from September 18th, 1869,) are valid.

The invention consisted in making one of the surfaces that meet to close the water way or steam passage, of a piece of vulcanized rubber, instead of making it of metal and facing it with cork, or leather, or soft metal, the other surface being made of metal.

The substitution of the vulcanized rubber for the prior material produced a new result.

The use, for one of the bearing surfaces, of vulcanized rubber intermingled with other materials, the whole forming one compound, is an infringement of the patent.

(Before SHIPMAN, J., Southern District of New York, May 27th, 1876.)

SHIPMAN, J. Letters patent for an improved steam gauge cock were issued to Albert Bisbee on September 18th, 1855, were extended for seven years from September 18th, 1869, and were reissued, on June 14th, 1870, to Oscar T. Earle, assignee of Bisbee. This is a bill in equity, in favor of the owners of the reissued letters patent, to restrain the defendants from an alleged infringement, and for an account. Infringement and the novelty of the invention are denied by the answer.

The alleged invention, which is a compression steam gauge cock, was made by Mr. Bisbee in 1853, and consisted, in the language of the specification, "first, in making one of the surfaces that meet to close the water way or steam passage, of a piece of vulcanized rubber, which is protected from spreading,

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or confined in metal, in such manner that but little more than its bearing or acting surface is exposed ;" and, secondly, in making the other surface, which is of metal, in the form of a ring, "so that the rubber may be compressed by the same power more forcibly than if the metal surface were equal in area to that of the rubber."

Prior to this invention, the opposing surfaces of steam gauge cocks had been made of brass or other metal, which was speedily roughened or worn by the dirt or grit in the water. To remedy this difficulty, one of the surfaces was sometimes faced with leather or lead, but the steam soon destroyed the leather and corroded or cut away the surface of the lead. The joints leaked, and the cocks soon needed repair, whatever material was employed. The use of vulcanized rubber, as one of the bearing surfaces, overcame these difficulties. Its advantages are briefly explained by one of the defendants' witnesses to have been, that, "being a rubber or elastic substance, it would not wear and grind as metal surfaces would ; by its elasticity, it pressed upon the seat and easily made a tight joint ; it has always answered just as well in hot water as cold ; while metal surfaces and ground joints, in stop cocks, will not stand at all in hot water." The Bisbee cock has proved to be of great value. It has superseded the use of pre-existing devices, has met with large sales, and "has answered its purpose perfectly."

The main question in the case is as to the validity of the patent. The defendants have introduced a number of devices which are claimed to have anticipated the plaintiffs' patent. Of these, the valve patented by Albert Fuller was clearly antedated by the Bisbee invention. In neither one of the other prior inventions or prior publications was vulcanized rubber used as one of the surfaces to close the steam passage. This fact raises the question which was considered by counsel to be the principal one in the case, viz. : Is the substitution of vulcanized rubber for cork, leather or soft metal, by which substitution a substantially perfect gauge cock was first produced, the subject-matter of a valid patent ?

The difficulty which was to be overcome by the patentee was, to make a steam gauge cock which would not readily leak, and which would resist the action of steam. The result which he attained was the invention of a durable gauge cock, which remained tight under various pressures and different degrees of heat, and which did not get out of repair. This result was accomplished by the discovery of the fact, that highly vulcanized rubber, in consequence of its elasticity, would not be ground and abraded by water containing dirt or grit, and, in consequence of its durability and non-corrodible properties, would successfully endure and withstand the power of steam. In the year 1853, the peculiar adaptability of hard rubber to the varied mechanical purposes to which it has since been applied was much less understood than it is at the present time. The invention consisted in the practical application of the discovery, by such mechanical means that an efficient gauge cock was produced. An attempt was made to show that this invention had been anticipated by the application of sheets of vulcanized rubber to the edges of the doors or plates of manholes of steam engines, and also upon the delivery valves of engines; but, the analogy between the edge of a gasket upon the plate of a manhole or upon a delivery valve, and one of the opposing surfaces of a compression steam gauge cock, which is necessarily opened and closed at frequently recurring intervals, and which should be so constructed as not to become leaky from the constant use to which it is subjected, is so remote, that a rubber gasket cannot, with propriety, be considered an anticipation of Bisbee's invention. The remark of Coltman, J., in *Walton v. Potter*, (4 *Scott's N. R.*, 91,) seems to be applicable to this branch of the case: "It appears to me, that it" (the plaintiff's invention) "is a very useful application and adaptation of a substance, the properties and qualities of which for the purpose had never been known before, and, therefore, that it was properly the subject of a patent."

Again, the Bisbee invention comes within the principle which was enunciated in *Hicks v. Kelsey*, (18 *Wall.*, 673):

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"The use of one material instead of another, in constructing a known machine, is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, an increase of efficiency, or a decided saving in the operation, is clearly attained." Here, the substitution does not merely produce the same result in the same way, but produces a new result, differing from the former one so materially, that it might almost be said that the difference is one of kind and not of degree. The improvement was of such marked character, that the inference is, that the new device must have been the result of inventive thought, experiment and skill, rather than the result of mere mechanical judgment.

The defendants' device is an imitation of the plaintiffs' gauge cock, except that, in lieu of the vulcanized rubber, the defendants use the material which was patented by reissued letters patent issued to Nathaniel Jenkins, August 3d, 1869. The claim of the patent is for "an elastic packing composed of at least four tenths of finely pulverized, refractory, earthy or stony material, intimately mingled with, and held together by, rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described." The defendants have taken the principle or idea of the Bisbee invention, which was the production of a tight steam gauge cock by the use of vulcanized rubber as one of the bearing surfaces, and the same material is used, in the same form and shape in which it appears in the Bisbee invention. It is true, that other materials are intermingled with the vulcanized rubber, forming one compound, but the vulcanized rubber of Bisbee is none the less used because other materials are fused with it. The infringement is manifest.

Let there be a decree for an injunction, and an account.

*Solomon J. Gordon*, for the plaintiffs.

*Thomas W. Clarke*, for the defendants.

## HENRY O. BREWER vs. SAMUEL B. CALDWELL AND OTHERS.

B. brought a suit in equity in this Court against C. and others, and in it took the deposition of one I., as a witness. B. then discontinued the suit, and afterwards brought another suit in equity against the same defendants, in this Court, for the same cause of action. No proofs were taken in it by either party, and, after it had been set down for hearing, by the consent of both parties, the defendants applied for an order to permit them to read, as testimony, the deposition of I., so taken in the former suit. It was not shown that I. was dead, or that there was anything to prevent his being examined in the usual way: *Held*, that the application must be refused.

(Before JOHNSON, J., Southern District of New York, May 27th, 1876.)

JOHNSON, J. The plaintiff had another suit for the same cause of action for which the present suit is brought, and against the same defendants, in which the defendants examined as a witness one Ingersoll. The former suit was discontinued by the plaintiff, and soon after the present suit was commenced. The time to take proofs expired on the first Monday of April, 1875, and no proofs were taken by either party. After the cause was noticed and had been set down for hearing, by consent of both sides, at the February equity term, this motion for an order to permit the defendants to read the deposition of Ingersoll upon the hearing was made. The witness appears to be living, and nothing appears which prevented his being examined in the usual way. The claim to read his deposition taken in the former cause is made upon the idea that there is some peculiar rule of law which permits secondary evidence of this sort to be used in equity proceedings. In several of the cases commonly referred to as sustaining this view, the discussion has been as to the circumstances which would warrant the use of the depositions as secondary evidence, assuming that the case was such as made proper secondary evidence admissible. Thus, in *Backhouse v. Middleton*, (1 *Cases in Chy.*, 173,) there was a motion for leave to

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use depositions taken in a suit which had been dismissed, and some distinctions upon that subject were stated and discussed by the Court; but, as a basis for it all, it appeared that the witness was dead. So, also, in *The City of London v. Perkins*, (3 Bro. P. C., 602, Tomlin's Ed.,) which is cited in 1 *Daniell's Ch. Pr.*, 870, as authority for the position that it need not appear that the witnesses were dead, it nevertheless did distinctly appear that all of them were dead; and the reversal in the House of Lords seems to have proceeded upon the ground that the Court of Exchequer had disregarded the substantial proof on that point. The subject was discussed in *Blagrove v. Blagrove*, (1 De G. & S., 252,) and the leading authorities were referred to—*Nevil v. Johnson*, (2 *Vernon*, 447,) *Byrne v. Frere*, (2 *Molloy*, 157,) and *Barstow v. Palmes*, (*Prec. in Ch'y*, 233.) In the examination of these cases, in *Taylor on Evidence*, (vol. 1, § 439,) it appears, (and so the fact is shown to be, on reference to the cases,) that, in *Byrne v. Frere*, the witnesses were almost certainly dead, and that, in *Nevil v. Johnson*, and *Barstow v. Palmes*, there is nothing to show that they were alive. Both in the work cited, and in *Gresley's Eq. Ev.*, 184 to 187, the whole question is treated as part of the law of secondary evidence, and as stating the rule when some legal reason exists to excuse the not examining the witness personally; and this view is confirmed by the decision in *Carrington v. Cornock*, (2 *Simons*, 567.) Such an anomaly in the law of evidence as the substitution of a deposition in a former suit, for the examination of the witness in the pending suit, as primary evidence, ought not to be maintained, unless the course of the authorities has firmly established it. When there are cause and cross-cause, the two suits being substantially one, such a practice seems unobjectionable. But, where a suit is ended by voluntary dismissal, there seems no reason for the practice. I find no trace of its existence in the Courts of the United States; and, in this District, I am unable to ascertain that any such order as is moved for has ever been made. There are two cases, one in Kentucky and one in New Hampshire, in which the practice ap-



pears to have been followed. (*Brooks v. Cannon*, 2 *A. K. Marshall*, 525; *Leviston v. French*, 45 *N. H.*, 21.) In the first case, the Court says that the deposition which had been excluded ought to have been received, as coming emphatically within the rule of chancery practice, which allows depositions in one cause to be read in another, between the same parties; but, nevertheless, the judgment was affirmed. In the other, the Court, on the authority of *Nevil v. Johnson*, above mentioned, referring to *Daniell's Chancery Practice*, *Chitty's Eq. Digest*, and *Greenleaf's Evidence*, affirms it to be within the discretionary power of the Court to permit a deposition to be read, and allows it in the particular case. Even taking that view of the law, I should think it indiscreet to order the deposition in this case to be read at the hearing. The cross-examination shows that a further examination of the witness was expected to take place at Mobile. But this did not take place, the bill having been dismissed after a question of jurisdiction depending upon citizenship had been raised. As the plaintiff felt constrained to dismiss his bill, it would have been idle to go on with an examination at Mobile, unless he was bound in that cause to consider what might be his needs in respect to the witness in any future cause for the same matter, and between the same parties; and, in this cause, he had no occasion to consider what further examination might be advisable, because, until after the proofs were closed, he had no notice, or reason to suppose, that the defendants desired to use the evidence in question. I think, therefore, that the defendants' motion should be denied.

*Aaron P. Whitshead*, for the plaintiff.

*William D. Shipman*, for the defendants.

THOMAS A. WESTON

vs.

WILLIAM H. WHITE AND OTHERS. IN EQUITY.

English letters patent were granted to W., April 25th, 1859, and published October 22d, 1859. He applied for a patent in the United States, for the same invention, in 1866, and it was granted to him August 6th, 1867: *Held*, that the latter patent would expire October 22d, 1876, 17 years from the publication of the English patent, and not before.

The effect of the 16th and 17th sections of the Act of March 2d, 1861, (12 *U. S. Stat. at Large*, 249,) upon the 6th section of the Act of March 3d, 1839, (5 *Id.*, 354,) was to give to an American patent a duration of 17 years from the date of a foreign patent previously granted to the patentee for the same invention.

The fact that a patent has been issued by the United States for an invention, does not, of itself, prove the introduction of the invention into public and common use in the United States.

(Before SHIPMAN, J., Connecticut, May 29th, 1876.)

SHIPMAN, J. The facts which are disclosed by the record are, that English letters patent were issued to Weston for the same invention described in the letters patent on which this suit is brought, bearing date April 25th, 1859, and published October 22d, 1859. Letters patent for substantially the same invention were granted by the United States to J. J. Doyle, bearing date January 8th, 1861. The patent in suit bears date August 6th, 1867, and was granted in pursuance of an application dated October 3d, 1866, and received at the Patent Office December 1st, 1866. The main question which is thus presented, is—Did the plaintiff's American patent expire at the end of fourteen years from the date of the publication of his English patent?

In my opinion, the 16th and 17th sections of the Act of March 2d, 1861, (12 *U. S. Stat. at Large*, 249), were intended to change all pre-existing statutory provisions by which American patents were limited to fourteen years, and to provide thereafter a term of seventeen years, without extension.

This being the intent of the Legislature, the proviso of the 6th section of the Act of March 3d, 1839, (5 *Id.*, 354,) that, where a foreign patent had been granted to the patentee, prior to his American patent, the latter patent should be limited to the term of fourteen years from the date of such foreign letters patent, was, by the operation of the 16th section of the Act of 1861, necessarily amended, so that American patents subsequently issued and embraced within such proviso should extend for the new term of seventeen years from the date of the foreign patent. The proviso was not based upon the idea that American patents should expire at the same time with the foreign patent. It is true, that, when an English patent had been taken out, such would be the practical result, but it would not be the result when a patent had been granted by the Government of a foreign nation whose laws provided a term of five, ten, or fifteen years. The intent of the 6th section of the Act of 1839 was, that, in case a foreign patent had been issued, while the American patent was to be issued for the term of fourteen years, (which had been previously provided as the duration of the life of all American patents, subject to extension,) the American patent should be considered, for the purposes of the duration of the term, as antedated to the commencement of the term of the foreign patent. The Act of 1861 made no alteration in this general system of legislation, but, having altered the term of American patents to seventeen years, and having provided for a repeal of all laws inconsistent therewith, the 6th section of the Act of 1839 was changed accordingly, by force of the new provision of the statute of 1861. The Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 198,) introduced a new principle, and provided that the American patent should expire at the same time with the foreign patent, but should not exceed a term of seventeen years. The plaintiff's patent will not, therefore, expire until October 22d, 1876.

The mere fact that letters patent of the United States were issued to J. J. Doyle in 1861, for substantially the same invention which was patented to Weston, does not show that the invention had been introduced into public and common use in

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the United States prior to Weston's application. It may have been thus introduced, but, the fact that a patent had been issued, does not, of itself, prove the introduction into common use, without the necessity of other testimony.

The parties will proceed and be heard in regard to the questions of fact which arise upon the motion of the plaintiff.

*Edmund Wetmore*, for the plaintiff.

*John S. Beach* and *Stephen W. Kellogg*, for the defendant.

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AMOS BROADNAX vs. HENRY EISNER.

The plaintiff took proceedings, in December, 1875, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) to remove into this Court a suit brought by him in a State Court. The State Court made an order that the cause be removed, but eighteen days afterwards vacated such order. A term of this Court began on the first Monday of April, 1876. The plaintiff, although he had, in January, 1876, obtained from the clerk of the State Court a certified copy of the record, did not file it in this Court, or enter his appearance there, but, in May, 1876, applied to this Court to issue a *certiorari* to the State Court, commanding it to remove the suit to this Court, and to certify the record therein according to law: *Held*, that the plaintiff had been guilty of laches, and could not be allowed now to perfect the removal of the cause; that he already had all which the *certiorari* could give to him; and that the application must be refused.

(Before BLATCHFORD, J., Southern District of New York, June 6th, 1876.)

BLATCHFORD, J. This suit was commenced in the Supreme Court of New York, in April, 1875. The plaintiff alleges, that, by proper proceedings taken by him under the provisions of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) this suit has been removed into this Court, and he now presents to this Court a petition praying that this Court will issue a writ of *certiorari* to the Supreme Court of New York, command-

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ing that Court to remove this suit to this Court for trial, and to certify the record therein according to law, and to do and perform whatever may be necessary to be done in the premises by that Court, to lawfully and properly bring this suit before this Court for trial according to law. In December, 1875, the plaintiff presented to the State Court a petition and a bond, intended as a compliance with the provisions of the Act of March 3d, 1875, the alleged ground for the removal of the cause being that the plaintiff was a citizen of New Jersey, and the defendant a citizen of New York. The State Court, on the 28th of December, 1875, made an order that the cause be removed for trial "into the next Circuit Court of the United States for the Southern District of New York," and that the State Court do proceed no further therein. On the 15th of January, 1876, the State Court, on a rehearing of the matter, on the same papers, vacated the order of December 28th, 1875, and denied the motion to remove the suit into this Court.

The 3d section of the Act of March 3d, 1875, requires that the bond on removal shall contain a condition that the petitioner for removal shall enter in the Circuit Court of the United States, "on the first day of its then next session, a copy of the record" in the suit sought to be removed. The bond filed in this case, with the petition for removal, contains a condition that the plaintiff shall enter in this Court "on the first day of its next session, a copy of the record" in this suit. Such 3d section further provides, that, "the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court." The application of the plaintiff for a *certiorari* is based upon the view that the cause cannot proceed in this Court until a copy of the record in the State Court is entered in this Court; that such copy must be a copy certified by the clerk of the State Court; and that it must be a copy certified by him to this Court as a return of such copy to this Court by the State Court on a removal of the cause.

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The 7th section of the Act of 1875 contains a provision which modifies the requirement made by the 3d section, and embodied in the bond, that the copy of the record shall be entered in this Court on the first day of its next session. Such modification is, that, if the next term of this Court shall commence within twenty days after the filing in the State Court of the petition and bond for removal, the party applying for the removal shall have twenty days after such application, to file the copy of the record in this Court. The same section makes it a misdemeanor, punishable by fine, or imprisonment, or both, for the clerk of a State Court in which a cause removable under said Act is pending, to refuse to the party who applies to remove the cause a copy of the record therein, after tender of the legal fees for such copy. It further provides, that the Circuit Court to which any cause shall be removable under the Act, shall have power to issue a writ of *certiorari* to the State Court, commanding the State Court to make return of the record in any cause removed, or in which any party to the cause has complied with the provisions for removal, and enforce said writ according to law. The section then proceeds: "and, if it shall be impossible for the parties or persons removing any cause under this Act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State Court refuses to furnish a copy, on payment of legal fees, or for any other reason, the Circuit Court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the Court may determine; and, in default thereof, the Court shall dismiss the said action or proceeding; but, if said order shall be complied with, then said Circuit Court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said Circuit Court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires a copy of the record to

be filed as aforesaid." Even on the assumption that the words "to enforce forfeiture or recover penalty as aforesaid," may be regarded as surplusage, and as being without meaning, but not as rendering the provision inoperative, and that all the provisions of the 7th section relate to any cause which is removable under the Act, it is quite apparent that the whole object of the statute, in respect to a copy of the record, is to secure the filing in the Circuit Court of a correct copy of the record. The bond is to be conditioned that a copy of the record shall be filed. The 3d section of the statute does not say in terms that it must be a copy certified by the clerk of the State Court, but a copy so certified is the proper evidence and the best evidence of what the record is, and, in the absence of any other enactment, the intendment would be that a copy so certified was required. But, in addition to this, the 7th section, by making it a penal offence in the clerk of the State Court to refuse to furnish a copy of the record, shows that it was intended that, if possible, the copy to be filed should be a copy furnished by the clerk of the State Court, and certified by him. The requirement that he shall furnish it as a copy implies necessarily that he shall certify it to be a copy of the original in his office. The statute, then, in furtherance of the attempt to obtain such certified copy, provides that the Circuit Court may issue a writ of *certiorari* to the State Court, commanding the State Court to make return of the record. This writ may issue in a case where a party has in fact complied with the provisions of the Act for the removal of the cause, although the State Court may be of opinion that he has not so complied, and may have refused to make an order for the removal of the cause. The object, therefore, of the writ of *certiorari*, commanding the State Court "to make return of the record," is not to require the State Court, as is prayed in this application, to remove the cause to the Circuit Court for trial, but only to require the State Court, through its clerk, to certify a copy of the record. This Court may enforce such writ, if it is not complied with. But provision is also made for a failure to comply with the writ, by the enactment, that if, for any reason, it is impossible

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for the party who desires to remove the cause to obtain a copy of the record certified by the clerk, the Circuit Court is to order such party to file a copy which is not certified by the clerk, and that, if that be done, it shall be regarded as a compliance with the condition of the bond.

In the present case, the moving party presents as a part of his moving papers, a certificate made by the clerk of the State Court on the 31st of January, 1876, certifying that certain papers annexed thereto are copies of original papers on file in his office. Those papers embrace the entire record in this cause, so far as appears. Therefore, the clerk of the State Court did, long prior to the first term of this Court which was held next after the proceedings for the removal of the cause took place, (and which term began on the first Monday of April, 1876,) furnish a certified copy of such record to the moving party, and the State Court did thereby, through its proper officer, do everything which this Court would require it to do by means of a writ of *certiorari*. It was the duty of the plaintiff, on obtaining such certified copy, if he desired the removal of the cause to this Court to be consummated, to have filed in this Court on the first day of the term above mentioned such certified copy of the record, and to have entered his appearance in this Court, and then, so far as he was concerned, the cause would have been removed to this Court, leaving it to the other party to then move this Court to remand the cause to the State Court. This was the settled practice prior to the Act of 1875, and there is nothing in that Act to change it. (*Kanouse v. Martin*, 15 How., 198; *Hatch v. Chicago, Rock Island & Pacific R. R. Co.*, 6 Blatchf. C. C. R., 105, 118.) The plaintiff, therefore, failed to comply with the statute and with the terms of the bond. Having a duly certified copy of the record in the State Court, he failed to file or enter it in this Court at the proper time. It not appearing that it was impossible for him to obtain such certified copy, this Court has no authority to allow him to file a copy of the record, either certified or not certified, at any other time than that specified in the bond; and a writ of *certiorari* now would



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give to him nothing more than he appears to have obtained, without difficulty, long before it was necessary for him to comply with the condition of the bond. The plaintiff has been guilty of laches, and to permit him now to take steps in this Court to perfect the removal of the cause, would be to give him a privilege which the statute does not confer. The application is refused.

*The plaintiff*, in person.

*Dennis McMahon*, for the defendant.

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HUGO CARSTAEDT

*vs.*

THE UNITED STATES CORSET COMPANY. IN EQUITY.

The second claim of reissued letters patent granted to Hugo Carstaedt, November 19th, 1872, for an "improvement in take-up mechanism for looms for weaving irregular fabrics," namely: "The needles or points *k, k*, fixed in a stationary bar, and arranged as specified, so that the fabric, being drawn by the take-up proper, is continually carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth," is infringed by a mechanism wherein, instead of needles fixed in a stationary bar, there are small independent needle rollers, mounted on a fixed shaft, each roller rotating in the direction of the cloth when the cloth moves forward, but being prevented from moving backward when the tension of the take-up is relaxed, and then becoming stationary, and arresting the fabric and preventing it from being drawn back.

Although the new arrangement may be better, and may perform an additional service, it yet performs the same office as the patented device, by the same mechanical means.

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Where a party was convicted of a contempt in violating an injunction, but it appeared that he acted under competent advice, and had no intention of disobeying the order of the Court, no fine was imposed, but he was ordered to pay the costs of the application and of the affidavits.

(Before SHIPMAN, J., Southern District of New York, June 6th, 1876.)

SHIPMAN, J. This Court passed a decree on September 10th, 1875, (*ante*, p. 119), enjoining the United States Corset Company from further infringement of the second claim of re-issued letters patent granted to the plaintiff on November 19th, 1872, for an "improvement in take-up mechanism for looms for weaving irregular fabrics." The plaintiff has now brought a motion for an attachment against James Lyall, one of the officers of said company, for violating the injunction which was issued upon said decree.

The portion of the patented improvement which is referred to in the second claim consists, as stated in the specification, "in a series of needles or points arranged upon a stationary bar, in such relation to the take-up rollers, that the fabric is continually carried across said needles, to be received by their points, and to be arrested when a reverse motion of any part of the fabric is commenced." The mechanism is thus described: "*K* is a cross-bar immediately behind the roller *C*, and provided with a series of needles, *k*, *k*, in its lower edge, which catch in the goods and prevent its being drawn backwards under any circumstances, when the take-up mechanism releases it." The second claim is for "the needles or points *k*, *k*, fixed in a stationary bar, and arranged as specified, so that the fabric, being drawn by the take-up proper, is continually carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth." The result of this improvement, which it is said in the opinion of the Court upon the final hearing, was "the arresting of the fabric when it is released from the tension of the take-up, and so holding the cloth that it is prevented from doubling up in the centre," was previously unattained in corset weaving.

The defendants have modified their needle-bar, since the injunction was issued, so that it now consists of a number of small independent needle rollers, mounted upon a fixed shaft, which runs across the width of the cloth, in the same position and relation to the take-up which the shaft had before. Each of these rollers rotates forward towards the take-up, or in the direction of the cloth, when the cloth is being moved forward and taken up by the take-up mechanism, but the rollers are prevented from moving backward, when the reed recedes and the tension of the take-up is relaxed, by a ratchet and pawl applied to each roller. Each roller then becomes stationary, arrests the fabric when a reverse movement has commenced, and prevents the cloth from being drawn back when the take-up mechanism has released it. When the reed moves forward and delivers its blow, the cloth is easily pulled over the rotating rollers by the take-up; when the reed goes backward, the rollers are fastened by the ratchet and pawl, become stationary, catch the cloth upon the needle points, and hold it so that it will not double up. It is contended, that such a needle-bar is not a stationary bar and, therefore, is not embraced within the second claim of the patent. It is a rotating bar when a stationary bar is not needed, but, when one is needed, it is the same stationary bar which was previously upon both plaintiff's and defendants' machines, and accomplishes the same practical result, that of arresting and holding the cloth. The needle points of the former needle-bar were inclined towards the take-up, so that, when the cloth was moving forward, it was carried across the needles, and, when it was released from the take-up, the cloth was arrested upon the needle points. The new roller of the defendants, when it is rotating in one direction, permits the cloth to go forward without detention, but, when a reverse action commences, the roller immediately becomes stationary, and the needle points catch and hold the cloth precisely as the old stationary bar accomplished the result. Neither bar assists the take-up mechanism in pulling forward or taking up the cloth, in any material degree, and

the roller of the defendants becomes a stationary bar whenever stability is required.

The rotating character of the new needle-bar is said to be an improvement upon the plaintiff's fixed bar. I think that this is true, and that the revolution of the roller with the forward movement of the cloth avoids any danger of the cloth being caught upon the needle points, as it is drawn forward. But, the fact that the new bar is a better one than the plaintiff's, or even performs a service which the plaintiff's bar does not perform, does not prevent the new device from being an infringement; it performs the same office which the old device performed, by the same mechanical means. An infringing device is not protected by the fact that, although the device "was an equivalent of the patented device, in all its functions, and in its construction and mode of operation, yet, by other or additional features, it possessed other and further useful functions. Such a device would, perhaps, be an improvement upon the patented device, but must be, nevertheless, deemed an appropriation of the former." (*Sarven v. Hall*, 9 *Blatchf. C. C. R.*, 524.)

My conclusion is, that the new needle-bar is an ingenious attempt to escape from the second claim of the patent, and that the motion of the plaintiff must be granted. As the defendant acted under competent advice, and had no intention of disobeying the order of the Court, no fine is imposed, but he is ordered to pay the costs of the application and of the affidavits.

*John Van Santvoord*, for the plaintiff.

*George Gifford*, for the defendant.

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The Celluloid Manufacturing Co. v. The Goodyear Dental Vulcanite Co.

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## THE CELLULOID MANUFACTURING COMPANY

vs.

## THE GOODYEAR DENTAL VULCANITE COMPANY. IN EQUITY.

The owner of a useful invention has the right to sell it to all who will purchase, subject only to restraint from some party having a conflicting patent. He holds the right from the general law of the land, and needs no Act of Congress to enable him to make or vend his article, and obtains no such right from Congress. He obtains from the patent laws only the power to restrain another from unlawfully making, using or vending his invention.

Injuries to the trade or profits or business of a manufacturer do not fall within the preventive scope of the patent laws, but only injuries to the right of the patentee to exclude others from the manufacture, use, or sale of the article for which he has a patent.

A junior private patentee, who alleges that his patent does not conflict with a prior patent, and asks the Court so to adjudge, cannot sustain a bill asking the Court to decide that the plaintiff and his licensees are not infringers of the defendant's patent.

A suit in effect to limit a patent, or to declare that it does not extend to a certain class of cases, and, *pro tanto*, to have it adjudged void, can only be sustained by the Attorney General, in behalf of the United States.

A patentee has the right to sue any one of several alleged infringers of the patent, and to omit others, in his discretion. He cannot be compelled to enforce his right, against his wish.

A junior patentee or an alleged infringer cannot reverse this position, and, by making the elder patentee a defendant, compel him to assert his rights as against him.

A bill to prevent the publication of a libel injurious to the plaintiff's business can be sustained only when it appears that the statement is malicious as well as false. If made to advance the party's own sales, and upon the reasonable claim that he has the right which he asserts, the action must fail.

(Before HUNT, J., Southern District of New York, June 7th, 1876.)

THE allegations of the bill were, in substance, as follows :

(1.) On the 7th of June, 1864, letters patent were issued to John A. Cummings for "an improvement in artificial gums and palates." Such letters were reissued on the 10th of Jan-

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uary, 1865, and again on the 21st of March, 1865, and, by assignment, the same are now the property of the defendant. (2.) After becoming such owner, the defendant commenced a great number of suits against dentists, in the various Courts of the United States, for alleged infringement of the said letters patent, and which suits are still pending and undetermined in the Circuit Courts of the United States. (3.) On the 12th of June, 1870, letters patent No. 105,338 were issued to John W. and Isaiah S. Hyatt, for an "improvement in treating and moulding pyroxyline." The same were surrendered and reissued June 23d, 1874, as No. 5,928. (4.) This substance is useful, among other purposes, as a holder for sets of artificial teeth. (5.) On the 28th of March, 1871, letters patent 113,055 were issued to the Albany Dental Plate Company, as assignees of Hyatts and Perkins, an "improvement in dental plates from pyroxyline." (6.) The plaintiff is the holder, by assignment, of said letters Nos. 5,928 and 113,055. (8.) The plaintiff is largely engaged in manufacturing blanks, to be used as holders for teeth, under said patents. The substance produced under the patents the plaintiff denominates "celluloid," and the plaintiff is selling large quantities of such holders throughout the United States, together with licenses to use the same. (9.) The said rights were of great advantage to the plaintiff until interfered with and infringed by the defendant; and its rights have been acquiesced in and recognized by the public generally, and the plaintiff has invested a large amount of capital in the business, which will become valueless unless its exclusive character can be sustained. (10.) Of the great number of suits brought as aforesaid by the defendant, for alleged infringement of its patent, the great majority have not been defended; but the defendants therein have allowed decrees *pro confesso* to be taken against them, and the same are still pending before masters, under the usual order of reference. (11.) In none of said suits has the defendant averred in its bills that the use of celluloid, as a substitute for a vulcanite plate, is an infringement of the Cummings letters patent, nor, except in two instances, have

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the defendants in such suits ever pleaded that the use of celluloid was not such infringement; nor has such fact, or the question of law involved therein, ever been presented for legal decision, except as hereinafter stated. (12.) In a suit against one Wolf, commenced in 1872, in an affidavit and answer filed in opposition to a motion for an injunction, Wolf alleged that he used metal or celluloid bases, and that the same were not an infringement of the plaintiff's patent. The Court made an order that the defendant be restrained from the use of vulcanite artificial gums and palates, and that the plaintiff have leave to amend its bill. No amendment was ever made, but, as unamended, the bill was, on the 13th of July, 1875, taken as confessed. (13.) In July, 1875, the defendant and one Josiah Bacon commenced an action against one Eben M. Flagg, upon a printed bill in substance like that in the suit against Wolf and the other suits referred to, containing no allegation that the use of celluloid blanks was an infringement of the Cummings patent. Annexed to the bill was a copy of the specification of 113,055, various affidavits, and a copy of the deposition of Henry J. Fisk, given in a suit of *Goodyear Dental Vulcanite Company* and *Josiah Bacon v. Preterre*, and sets of celluloid teeth and of vulcanite teeth. There was, also, upon all of these papers, a notice of motion for preliminary injunction. Flagg had purchased his celluloid blanks of the plaintiff, and was using them in his business. The plaintiff assumed the defence of Flagg's suit, to the knowledge of the defendant. The motion was heard upon the issue presented by the letters patent of the plaintiff and defendant in this suit, and, on the 7th of December, 1875, Judge Blatchford made an order denying the motion, on the ground that it was not sufficiently clear that the defendant's process was embraced in the plaintiff's claim, to warrant the granting of an injunction, until one should be granted as the result of a final hearing of the case. Certain allegations were made by the present defendant on the application, that proofs in a suit against William H. Dwinelle were on file, and that they were identical with the proofs taken in a suit against

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Daniel H. Smith, and that the record against Smith constituted a part of the proofs on that motion, and that the question of the conflict between the patents now in question would thus be presented as a question of law, and plaintiff supposed the suit against Flagg would be proceeded in, and the question now at issue would thus be presented for decision, but, on the 23d of December, 1875, the plaintiff in that suit discontinued it by an order, reciting as reasons, that Flagg had demurred to the bill on account of the misjoinder of Bacon as a plaintiff therein, and also the great pressure of business and delay of hearing in this Circuit Court. (14.) Such discontinuance was not made for the reasons mentioned, but was illusory, and to prevent the entry of an order on Judge Blatchford's decision, to prevent a final hearing, and to enable the defendant to initiate a new means of harassing the dentists who purchased under the plaintiff's patent, and to restrict and impair the plaintiff's income therefrom. (15.) Since Judge Blatchford's decision, the defendant has caused notice to be given to the dentists using the celluloid blanks, not to use the same; that such use was an infringement of the Cummings patent; and that, if persisted in, such persons would be prosecuted as infringers. Such notice was given to dentists residing in various States and Circuits, who communicated the same to the plaintiff, asking protection against such claim, and this plaintiff has agreed to afford such protection. To do this would involve the plaintiff in a multitude of suits in various Circuits, would subject it to great expense and annoyance, and would practically involve such enormous costs as would render the plaintiff's patents valueless. (16.) Since Judge Blatchford's decision, the defendants have moved in the Circuit Courts in Maryland, Pennsylvania, and Michigan, for references to masters, and commenced the taking of accounts in suits in which the defendants have suffered the bill to be taken *pro confesso*. Such defendants are not of sufficient ability to defend such suits, but yield a ready assent to any request that may be made of them, the infringement being ostensibly



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proved and admissions procured in evidence of the Preterre suit and also of the Smith suit in Massachusetts. In a suit brought by defendant and Bacon against Jared Kibbee, the master made his report, which contains, among other things, an admission of the printed record in the Preterre case referred to, and reports damages to the amount of \$220. The plaintiff had no knowledge of the Kibbee suit. Kibbee was not represented by counsel, was ignorant of his rights, and the evidence by the said records, and also of the celluloid blanks which he had used, was illegal and incompetent. The only question referred to the master was, whether Kibbee had sold vulcanite dental plates in infringement of the Cummings patent, and the question whether the use of celluloid blanks was an infringement of the Cummings patent was not passed upon prior to the order of reference, and was not referred to the master; and whether the use of celluloid did constitute such infringement, could only be passed upon at the final hearing in a suit brought for that purpose. (17.) In another suit, brought by the same parties against one Hoopes, in Maryland, he allowed a decree to go against him for the use of vulcanite dental plates. He had been, and, so far as plaintiff knows, was, at the time of instituting said suit, an agent of the defendant, and a stockholder in its company. Hoopes was summoned to appear before the master. The plaintiff's counsel attended at the day appointed, and found that Hoopes had, on the previous day, consented to the admission of the records in the Preterre and Smith cases. Plaintiff's counsel then stated to the master the position of the case, whereupon the said Bacon, who was present, stated that they would make no claim against the defendant for the use of celluloid blanks, and an entry to that effect was made in the proceedings. (18.) The Preterre suit was commenced in December, 1874, for his having manufactured, used, and sold vulcanite dental plates. Preterre was defended by counsel not of plaintiff's employment, who were not acquainted with its rights, nor with the facts in relation to celluloid, as hereinbefore stated, and who made defence solely on the ground of the invalidity of the

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Cummings patent; and they did not bring in issue the question between celluloid plates and vulcanite plates. Fisk was examined as a witness. Preterre endeavored to establish that the plates he used, which were testified to be vulcanite, were in truth celluloid, and on this point Fisk was examined as a witness. Preterre afterwards abandoned his attempt to prove a similarity between the two substances, and, in June, 1875, he requested Hyatt to appear as a witness in his behalf. Renwick was afterwards examined as a witness against Preterre, and this plaintiff requested its counsel, Mr. Baldwin, to appear and cross-examine him; and this plaintiff made no other appearance in that case than that one of its counsel conducted such cross-examination. Preterre did not assume to present the right under this plaintiff's letters patent, nor the state of the art. The defendant's counsel in that case was also induced to admit in evidence the record in the Smith case. (19.) The production of the Preterre record before the master is for the purpose of establishing an identity between the vulcanite and the celluloid plates, and the introduction of the same under the pretence that this plaintiff was a privy to the same, is a fraud and an attempt to create a belief that that record is a full presentation of this plaintiff's case, and an attempt to gain an unjust advantage. (20.) This defendant caused the record in the Kibbee case, after Kibbee had consented as aforesaid, to be printed continuously with the Preterre case, and to be served upon Mr. Baldwin, this plaintiff's counsel, for the purpose of binding this plaintiff thereby; and similar proceedings have been taken in other cases. (21.) The legal rights of the plaintiff, as herein averred, have not been properly presented to any tribunal, save in the Flagg case, and an attempt to create the impression that they have been before the Court is unfounded. This plaintiff has offered to waive the misjoinder of Flagg, and has requested this defendant to proceed in that suit, which it refuses to do. (22.) By other suits plaintiff is needlessly subjected to great loss in conducting the same, and in loss of revenue; and, by reason thereof, many dentists are deterred from purchasing celluloid blanks,

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and thereby this defendant obstructs and retards the plaintiff in the legal use of its exclusive privilege. (23.) The defendant claims that the celluloid blanks are an infringement of its patent, and that it has a legal right to arrest the manufacture of the same. The plaintiff avers and insists that such claim is unfounded. (24.) The plaintiff is lawfully engaged in prosecuting the said business, and its right is invaded and infringed by the written and verbal threats of the defendant to prosecute those who make purchase of said blanks, and by its illegal prosecution of such multiplicity of suits, and by giving notice of its intention to hold responsible those who use the celluloid blanks, by reason whereof the plaintiff is injured in its business. (25.) The Cummings patent is void for the various reasons set forth. (26.) The rights of the parties are solely under the patents referred to, and depend upon whether the Cummings patent is valid, and, if so, whether the same interferes with the letters patent of the plaintiff; and such questions should properly be decided in a suit between the owners of the respective patents. Wherefore the plaintiff prays: 1. That this Court will entertain jurisdiction of this suit, to determine whether the Cummings patent is valid, and, if it is, whether the defendant is entitled to interfere with the celluloid dental blanks, as an infringement thereof; 2. That, in case it shall be held that celluloid is not an infringement of the Cummings patent, a final decree be entered, enjoining the defendant from commencing or prosecuting any actions against this plaintiff, or any dentists purchasing celluloid blanks from it; 3. That, in the event of such decree, an account may be taken of the profits it has made by such obstruction and interference with the plaintiff's business, and of the profits it has made by the sale of vulcanite plates to those who had theretofore been the customers of the plaintiff in the use of celluloid blanks, and of the profits which the defendant has made and the plaintiff has lost by means of the acts aforesaid; 4. That a preliminary injunction may issue restraining the defendant and its agents, during the pendency of this suit, from making threats of prose-

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cution for using celluloid blanks, or sending letters or circulars cautioning against the use of celluloid blanks, and from proceeding in any suit now pending for the use of celluloid ; 5. For costs and such other or different relief as to the Court may seem meet ; 6. For a subpoena in the usual form, and for a preliminary injunction during the pendency of this action, as hereinbefore prayed for. The defendant demurred to the jurisdiction of the Court, setting forth the following causes : 1. The bill is filed by a citizen of New York against a citizen of the same State ; 2. The United States are not parties plaintiff, or petitioners ; 3. The suit does not arise under the Constitution or laws of the United States ; 4. The bill is not brought in the name of the United States, or its Attorney General ; 5. The bill contains no equity whereon relief can be given ; 6. The plaintiff has an adequate remedy at law, if the facts stated in the bill constitute any cause of action.

*William D. Shipman, Clarence A. Seward, and E. Luther Hamilton*, for the plaintiff.

*Edward N. Dickerson and Benjamin F. Lee*, for the defendant.

HUNT, J. This case comes before the Court in a double aspect. It is presented, first, in the form of a motion for a preliminary injunction, which is based upon the bill of complaint, and upon affidavits and documents furnished by the respective parties. It is presented, secondly, upon a demurrer to the bill of complaint. The question upon the equity of the bill has been fully argued, as has also the propriety of issuing a preliminary injunction, upon the case made by the additional evidence. The question that presents itself first, in the natural order of things, is upon the sufficiency of the bill ; in other words, is the demurrer well taken ?

The plaintiff alleges itself to be the owner of a useful invention, in the manufacture of plates for holding artificial teeth. By the general laws of the land, State as well as National, it has the right to sell that improvement to all who

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think it of sufficient value to induce them to purchase it, subject only to restraint from some party having a conflicting patent. So far as its own use or manufacture is concerned, it needs no Act of Congress to enable it to make, use and vend the article, and it obtains no such right from Congress. The benefit of the patent laws is, that the plaintiff may prevent others from making, using or vending its invention. To itself, to its own right to make, use or vend, no right or authority is added by those statutes. When a stranger shall thus make, use or vend its manufacture, the patent laws enable it to restrain such use, and to recover damages therefor. Do the subjects of complaint in the bill set forth fall within this right of action given by the patent laws? Are not the injuries complained of injuries to the trade, the profits and the business of the plaintiff, as carried on by itself, for which it has and needs no patent authority, rather than injuries to the right of the patentee to exclude others from such sale or manufacture? It is to this latter class only that the patent laws apply, and for injury to those rights only that actions under the patent laws can be sustained. See *Hawks v. Swett*, (4 *Hun*, 149, 150,) where this principle is fully set forth.

The bill contains a prayer that the defendant's patent may be adjudged to be void and of no effect. On the argument it was, however, conceded, that, for the purpose of the present proceedings, that patent must be held to be valid. It has been adjudged to be valid, in numerous cases in the Circuit Courts, tried before different judges, and, until held otherwise by the Supreme Court, must be taken to be a valid patent.

The plaintiff is the owner of certain other patents issued to the Hyatts and to Perkins, for an "improvement in dental plates from pyroxyline." These are commonly called celluloid plates. In the 24th section of the bill of complaint it is averred that the defendant claims that the use of the celluloid blanks is an infringement of the Cummings letters patent. This claim, it is alleged, has no lawful foundation, and it is averred that the true construction of the Cummings patent does not support the same, or give to the defendant any right

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to interfere with or arrest proceedings under it. Notwithstanding this allegation, the plaintiff insists, and such is the object of its bill, that the Court shall decide whether, if the plaintiff or those who hold its licenses shall make or vend its articles patented, it would amount to an infringement of the defendant's patent. In my judgment, such an action cannot be sustained. No case has been cited to me, nor do I think any can be found, sustaining an action by a junior private patentee, who alleges that his patent does not conflict with the prior patent, and who asks the Court so to adjudge. It is, in substance, a suit to limit the effect of a patent, to declare that it does not extend to a certain class of cases, and, *pro tanto*, to have it adjudged to be void and of no force. Such an action can only be sustained by the Attorney General, in the name and on behalf of the United States. (*Mowry v. Whitney*, 14 Wall., 434.)

To allow the action is to reverse the proper position of the parties. Whoever receives letters patent from the United States receives thereby a *prima facie* right to maintain an action against every infringer of the right given by such letters. While it is true that such right is *prima facie* only, and that the holder must be prepared to maintain it in the Courts when attacked, it is still a right on his part to sue such alleged violators. The present action would convert the right to sue into a liability to be sued, which is quite a different thing. The defendant holds the Cummings patent. It finds that the patent is infringed and its rights injured by A., B. and C., in the State of New York, and E., D. and F., in the State of New Jersey, and so on through the alphabet. The defendant has a right of action against each one of these individuals. It has the right to sue the whole of them. It has the right to sue any one of them, and to allow the others to go undisturbed. While it would not be a high-minded theory, I know of no principle that, as matter of law, would prevent its seeking the feeblest of them all, the one least able to defend himself, and to make a victim of him. If that individual shall appear to have infringed upon this defendant's patent,

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he is liable to the damages, although he may be poor, unable to defend himself, although others have offended in a greater degree, and although we may condemn the spirit which selected him as the particular defendant. On principle, this cannot be doubted. But, the plaintiff seeks to reverse this action, by making the elder patentee a defendant, at the suit of a particular offender, and to compel him, whether he chooses or does not choose, to assert his rights as against him.

Again, such a suit gives no practical result in the settlement of the question. Suppose it to be decided in this suit, that the celluloid preparation is not an infringement of the Cummings patent. Nothing is settled except as between the two parties present as litigants. If the defendant should afterwards sue a dentist in Michigan for infringing its patent, the judgment in the present case would be no evidence against it, to show that there was no infringement. It would be *inter alios acta* and not competent; and so, if the judgment should be the other way, the defendant could not have the benefit of the decision, as against another alleged infringer. Each plaintiff and each defendant can litigate his own case, and is not bound by decisions in other cases, to which he was not a party, and which he had no opportunity to litigate. Such is the rule of law, and its necessity, to avoid collusive judgments and fraudulent combinations, is too obvious to need defence.

The cases of *Axmann v. Lund*, (*L. R.*, 18 *Eq. Cases*, 330,) and *Rollins v. Hinks*, (*L. R.*, 13 *Eq. Cases*, 355,) give countenance to the suggestion that the bill in this case may be sustained, to prevent the publication of libels injurious to the plaintiff's business. The case of *The Prudential Assurance Co. v. Knott*, (*L. R.*, 10 *Chancery Appeals*, 143,) is a subsequent case, and is to the contrary. It is to be said further, in answer to these cases: 1st. They were based upon the theory that the defendants made their claim and published their injurious circulars, but refused to bring suits to sustain them. The record here shows that numerous suits have been brought, and that at least four suits, to wit, those against Silliman, Kibbee, Hoopes and Greene, are specifically proved

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by the evidence, in the first two of which the defendant has obtained decrees that the celluloid is an infringement of the Cummings patent, and in the other two the proceedings are still pending before the masters. 2d. No such action at law or in equity can be maintained unless it is established that the publication is malicious and for the purpose of injuring the other party. If made to advance the publisher's own sales, and upon a reasonable claim that he has the right which he asserts, the action must fail. (*Wren v. Wield*, *L. R.*, 4 *Queen's Bench*, 730.)

Upon the same point is the case of *Hovey v. Rubber Tip Pencil Co.*, (57 *N. Y.*, 119,) which was an action to restrain the defendant from publishing notices injurious to the plaintiff's business. It was a case of alleged conflicting patents, in which the defendant cautioned all persons against using the plaintiff's invention, alleging his intention to prosecute all infringements. The Court held, 1st. That the questions presented arose directly upon the patent laws of the United States, and hence were not within the jurisdiction of the State Courts, citing *Dudley v. Mayhew*, (3 *Comst.*, 9,) and *Middlebrook v. Broadbent*, (47 *N. Y.*, 443,) considering, also, *Gibson v. Woodworth*, (8 *Paige*, 131,) and *Burrall v. Jewett*, (2 *Id.*, 134); 2d. That, to justify the action as a slander of title, the proceedings must appear to have been unfounded not only, and the statements false, but malicious. If the defendant believed its statements to be correct, it merely discharged a moral obligation and satisfied the demands of fair dealing, in making the publication.

It is contended, also, that ground for filing the bill is found in section 4918 of the Revised Statutes of the United States, in relation to interfering patents. That section is as follows: "Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the Court, on notice to adverse parties, and other due pro-



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ceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit, and those deriving title under them subsequent to the rendition of such judgment." The sixteenth section of the Act of July 4th, 1836, and the Act of July 8th, 1870, make corresponding provisions on this subject. To give the plaintiff the benefit of this statute, it must abandon the allegation of its bill, that the celluloid is not an infringement of, or interference with, the Cummings patent. It must assume the ground there imputed to the defendant, that these two patents do conflict and interfere, and there unqualifiedly denied by the plaintiff, and must assume the position there imputed to the defendant, of the identity of celluloid or collodion dental plates with the subject of the defendant's patent. The argument of the defendant is, that celluloid or collodion was a well known agent when the plaintiff's patent was obtained, known as an equivalent for vulcanite in the manufacture of dental plates, and that there could, therefore, be no patent lawfully issued for the application of collodion to dental plates. The Cummings patent is upheld upon the theory that the vulcanite possessed qualities not found in any other material used for that purpose, and that the mode of manufacture was different from that in which any other artificial set of teeth had been made. The Hyatt dental patent, it is argued, exhibits no novelty in the quality of the result produced or in the mode of manufacture. Until the plaintiff shall be prepared to assert that the two patents are substantially for the same invention, that its patentee is the real discoverer of the invention therein set forth, and that the defendant has wrongfully and improperly appropriated the fruits of his invention, I do not see how the statute respecting interfering patents can be invoked. (See *Curtis on Patents*, last chapter.)

In reaching this conclusion, I do not assume either that the

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plaintiff's patent is void, or that it is an infringement of the Cummings patent. No opinion is intended to be intimated upon those points. Under this branch of the case, the suggestion is, simply, that a case of interference is not presented, where the plaintiff avers that there is no interference. An averment that the defendant claims an interference, and a denial of such claim by the plaintiff, cannot authorize the plaintiff to ask a settlement as for an interference. The prayers and the relief to be afforded to the plaintiff must be upon the facts as it claims them to exist, not as the defendant claims and which the plaintiff denies.

It is said, lastly, that jurisdiction to sustain the present controversy is found in section 1 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) which provides as follows: "The Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects." The jurisdiction of the Federal Courts, under the Constitution and laws of the United States, depends upon two points—first, as arising from the subject-matter of the controversy; and, second, as dependent upon the character of the parties. (*Cohens v. Virginia*, 6 *Wheat.*, 378. See *Mathews v. McStea*, 20 *Wall.*, 646; *Littlefield v. Perry*, 21 *Wall.*, 222.) The Act of 1789 made the jurisdiction of the Circuit Courts dependent upon the character of the parties. The Act of 1875 has altered this rule, and gives to that Court jurisdiction in all cases in law and equity arising under the laws and Constitution of the United States. It cannot be doubted that controversies arising

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upon conflicting claims to or under patents issued under the laws of the United States are cases arising under the laws of the United States. It is upon this theory that the Circuit Courts have, from the foundation of the Government, entertained jurisdiction of patent cases. This principle has been assumed in the previous parts of this opinion, and its existence does not relieve from the difficulty now pressing upon us. The objection is not, that, in its subject-matter, the case does not present one of Federal jurisdiction, to wit, the adjustment of conflicting claims under the patent laws of the United States, or the awarding of damages for an infringement of such patents, but the question is, whether, in the form in which the facts are presented, the plaintiff can sustain his bill or is entitled to an injunction. The Act of 1875 does not touch this point.

Upon the principles already laid down, I am of the opinion that this action cannot be sustained, and that the demurrer must be upheld. It follows, that the motion for the injunction must be denied. A preliminary injunction cannot be granted when it is conceded that the plaintiff must finally fail in his action.

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WILLIAM PERRIGO AND OTHERS

vs.

## CHAUNCEY B. SPAULDING. IN EQUITY.

In a suit in equity on a patent for a machine, brought by B. against W., B. obtained a decree that W. had infringed, by making and selling machines, and ordering that W. account to B., both for the damages B. had sustained and for the profits W. had made, by the infringement, and fixing the amount of such damages and profits and directing the mode of payment. The amount was paid. Among the machines embraced in such suit, and covered by such

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decree, was one which W. had sold to S. After the decree was made, B. made an agreement with P., which was claimed by P. to affect the rights of S. in respect to such machine, and P., as owner of the patent, sued S., in equity, for an infringement by continuing to use the machine, and applied for an injunction to restrain such use: *Held*, that the application must be refused.

The agreement between B. and P. could not affect the rights of S.

S., by means of the decree and its payment, acquired the right to use the machine until it should be incapable of further use.

The rules stated, as to when a recovery by a patentee against an infringer, and its payment, will carry a right, and when it will not.

(Before JOHNSON, J., Northern District of New York, June 7th, 1876.)

JOHNSON, J. The rights of the defendant became fixed at the date of the decree in the suit between Birdsall and Wickson & Van Wickle, the vendors to Spaulding of the machine the use of which is sought in this suit to be enjoined. That decree was made in January, 1875. Its force and effect, as between the parties and their privies, could not be affected by a subsequent agreement between the plaintiff in that suit, Birdsall, and the plaintiffs in the present suit. Their agreement bore date in September, 1875. It attempted to engraft a clause contained in it upon an earlier agreement between them, which bore date in September, 1874. This it was competent for them to do, so far as their own rights were concerned; but the previously existing rights of third persons could not be thus affected. The decree against Spaulding's vendors must be looked to, in order to determine whether its effect was to authorize the use by Spaulding of the patented machine which he had purchased of them, until it should be incapable of further use. There is no question that the machine now owned by the defendant Spaulding was one of those for the making and selling of which Wickson & Van Wickle were sued by Birdsall, and for which he claimed to recover both profits and damages; nor that it was embraced in the decree in that suit; nor that the decree has been fully satisfied, in respect to the damages and profits awarded. The question is, therefore, what effect is to be given to the decree. By its terms, it adjudges that the defendants Wickson & Van Wickle have infringed the patents owned by Birdsall, by mak-

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ing and vending the machines manufactured by them, and orders that they account to the plaintiff both for the damages sustained by him and the profits made by them, in consequence of such infringement. It then declares that the amount of such damages and profits is adjudged to be the sum of one thousand dollars, and directs the mode of payment.

It seems to be well established, that, when a patentee gets his remuneration by patent or license fees, a recovery of the license or patent fee from an infringer, and its payment, authorizes him to use the particular articles for which such recovery has been had. On the other hand, when a patentee chooses to use his invention himself, and find his remuneration in the sale of the products of its use, and to prevent others from using his invention, it is his right, and then a recovery for profits and damages will be limited to the profits and damages up to the time of the recovery. Such a recovery will not carry with it any right to the further use by the infringer, of the invention. (*Suffolk Co. v. Hayden*, 3 Wall., 315; *Spaulding v. Page*, 4 *Fisher's Pat. Cases*, 641, 645, 646.) But, where the patentee sells his patented instrument or machine for use by others, finding his remuneration in the profit of the sale of the manufactured machine or instrument, it is obvious that his interest is promoted by increasing the sale, and that into his profit enters the value of the patented invention over and above the cost of manufacture and the ordinary fair profit of the manufacture. Even if no patent or license fee is fixed, the value thereof, as a profit, enters into the selling price, and, if not capable of exact ascertainment, may, nevertheless, be approximated to by estimation, when necessary. When the patentee sells, he receives this profit, and thus obtains full compensation for the article sold and for the right to use it while it lasts. When, for an infringement, he obtains both the profits and damages, he will be presumed to have obtained a full compensation for all the injury he has sustained, and to be placed in as good a position as if he had made and sold the article himself. Such is, I think the presumption between parties thus situated, and, if any different rule is sought

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to be applied in any particular case, it should appear that a recovery has not been sought or obtained for the whole gains of the manufacture as well as for all the damages sustained. (*Spaulding v. Page*, before cited; *The Gilbert & Barker Manufacturing Co. v. Bussing*, 12 *Blatchf. C. C. R.*, 426.) When a patentee manufactures and sells his patented article for use, the right to use passes by the sale. If an infringer manufactures and sells, he must account for and pay the profits, which are to be calculated upon the principle that the gain by the appropriation of the patentee's invention is their measure. If there are damages sustained and proved by the plaintiff, beyond the profits made by the infringer, these also may be recovered. But, when a full recovery and satisfaction from one party has been had, the patentee has obtained all that the law gives him, and the particular article or machine, if it be a machine, becomes, in effect, licensed by the patentee, and may be used so long as it lasts, free from any further claim by the patentee.

The motion for an injunction must be denied.

*W. W. Hare*, for the plaintiffs.

*Edgar P. Glass*, for the defendant.

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The Fourth National Bank of Chicago v. Neyhardt.

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## THE FOURTH NATIONAL BANK OF CHICAGO

vs.

JOSEPH NEYHARDT.

On a consent given in open Court, a reference of an action at law was made to a referee, to hear and determine all the issues therein. The referee found for the plaintiff for a sum certain, and a judgment was entered on the report without any application to the Court. The report was, by a clerical error, entitled in the District Court, but it was filed in the Circuit Court, and was proceeded upon as if it had been correctly entitled. There was no other cause pending between the same parties, and no one was misled by the mistake. The defendant moved to set aside the judgment: *Held*,

- (1.) That the mistake as to the entitling might be disregarded or amended *nunc pro tunc*;
- (2.) That it was not irregular to enter the judgment without an application to the Court, such being the practice of the Courts of the State.

Suggestions as to the proper mode of obtaining a review of the decision of a referee, where a judgment is entered on his report without having been presented to, or considered by, the Court.

(Before JOHNSON, J., Northern District of New York, June 7th, 1876.)

JOHNSON, J. This is a motion to set aside a judgment in an action at law, entered upon a report of a referee, without any application to the Court. The order of reference was made by the Court upon consent given in open Court, and thereby the action was referred to Isaac M. Lawson, as referee, to hear and determine all the issues therein. The referee heard the cause and made his report, finding certain facts which are set out, and that the plaintiff had suffered damages, by reason of the matters found, to the amount of \$12,161 43. He further finds, as a conclusion of law upon the facts found, that the plaintiff is entitled to recover judgment in the action, against the defendant, for the said sum of \$12,161 43. By a clerical error, this report was entitled in the District Court.

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The Fourth National Bank of Chicago v. Neyhardt.

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It was filed in the clerk's office of the Circuit Court, and proceeded upon as if it had been correctly entitled. No other cause was pending between the same parties, and no one was misled in any manner by the mistake. Under these circumstances, I think the mistake may be disregarded, or amended *nunc pro tunc*.

The question upon the merits is, whether judgment can be entered without an application to the Court. In the case of *Heckers v. Fowler*, (2 Wall., 123,) it was held, that a reference by consent, in an action at law, could be made in the Circuit Court of the United States, and that a judgment could be entered without application to the Court, upon the report of the referee, where such was the stipulation of the parties, and the order of the Court thereupon, in making the reference. The Act of June 1st, 1872, adopting the State practice for the time being, in actions at law, which is now contained in section 914 of the Revised Statutes, is, I think, at least equivalent to the clause of the stipulation in *Heckers v. Fowler*, and authorizes the entry of judgment upon the report of the referee, without any application to the Court.

The only difficulty which the matter presents grows out of the fact, that there is, in the Circuit Courts of the United States, no division into special and general terms, as there is in the State Courts of New York. This presents some embarrassment in respect to preserving the right of review of the decision of the referee; for, it is quite probable, that the Supreme Court of the United States would not examine exceptions to a referee's report, which had never been presented to nor considered by the Circuit Court. But, if the exceptions taken to the referee's report were brought before the Circuit Court by proceedings taken under, or in analogy to those authorized by, section 987 of the Revised Statutes, or those provided when a trial is by the Court without a jury, and its judgment obtained upon those questions, and entered at the foot of the judgment roll, or inserted therein, it appears to me that the difficulty would be obviated.

In any event, the judgment was not irregular, in being en-



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tered without an application to the Court, founded on the referee's report, and the motion to set it aside on that ground must be denied.

*Stanley, Brown & Clarke*, for the plaintiff:

*David Wright*, for the defendant.

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PETER G. PETTERSON

*vs.*

WILLIAM P. CHAPMAN, HENRY P. CHAPMAN, AND ALFRED  
WOODBIDGE.

MORTON BROWNSON AND CHARLES ENNIS, EXECUTORS, &c.

*vs.*

THE SAME.

Citizens of New York brought an action of trover in a State Court against a citizen of New York and citizens of Connecticut. All the defendants took proceedings to remove the suit into this Court, under the 2d section of the Act of March 8d, 1875, (18 U. S. Stat. at Large, 470,) as being a suit in which there was "a controversy between citizens of different States:" *Held*, that the controversy in the suit was not one between citizens of different States, and that the cause must be remanded to the State Court.

The only changes introduced by this part of the 2d section of the Act of 1875 are, that either party, plaintiff or defendant, may remove the cause, and that it is no longer necessary that either party shall be a citizen of the State in

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which the suit is brought; but it still remains necessary that the State citizenship of each individual plaintiff shall be different from the State citizenship of each individual defendant, to authorize a removal under this part of said section.

(Before JOHNSON, J., Northern District of New York, June 7th, 1876.)

JOHNSON, J. These motions to remand to the Supreme Court of New York the causes above entitled are made upon the ground that the 2d section of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) does not authorize their removal into this Court. The plaintiffs and the defendant Woodbridge are citizens of New York, while the defendants Chapman are, or are alleged to be, citizens of Connecticut. Each action is for the conversion by the defendants, who were doing business as brokers, and were in partnership, of certain securities belonging to the respective plaintiffs. The application for removal was made, in each action, by all the defendants.

The 2d section of the Act referred to consists of two branches, the latter of which relates to cases in which the application to remove the cause into the Circuit Court is made by less than the whole number of plaintiffs or of defendants. It provides for cases in which more than one controversy, or a principal and subordinate controversies, are involved in one suit. This was also the case in the Act of July 27th, 1866, (14 *U. S. Stat. at Large*, 306,) which enacted, that, in a suit by a citizen of a State against a citizen of another State, and also a citizen of the same State as the plaintiff, if the controversy might finally be determined between the plaintiff and the citizen of the other State, without the presence of the other defendant, it might be removed. (*Osgood v. Chicago R. R. Co.*, 14 *Amer. Law Reg.*, N. S., 506.) The state of facts does not exist, in the case under consideration, to which the latter part of the section can be applied, and it is, therefore, not immediately involved.

The first part of the section provides, that any suit of a civil nature, involving a certain amount, then pending, or thereafter brought, in a State Court, "in which there shall be a

controversy between citizens of different States," may be removed by either party into the Circuit Court of the United States. The precise question presented is, whether the controversy in this suit is one between citizens of different States; for, that is the case in which alone the power of removal exists.

The judicial power of the United States extends, by force of the Constitution, among other subjects, to controversies between citizens of different States. On the other hand, it does not, in express words, at least, extend to controversies between citizens of the same State, when the power rests on citizenship alone. By the 1st section of the Act before cited, the original jurisdiction of the Circuit Courts of the United States extends to suits "in which there shall be a controversy between citizens of different States;" and, as we have seen, in the 2d section, the power of removal is, in this respect, conferred in the same terms. Under sections 11 and 12 of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 78, 79,) the jurisdiction of the Circuit Courts extended to suits between a citizen of the State where the suit is brought and a citizen of another State, and the power of removal of cases begun in the State Courts was expressed in the same terms. Upon the words thus employed, the construction was early settled, that the designation was intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons all of whom are entitled to sue, or are liable to be sued, in the Courts of the United States. This doctrine was reaffirmed in *Coal Co. v. Blatchford*, (11 *Wall.*, 172,) and is unquestioned law. In the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 558,) a power of removal was given in a suit in a State Court "in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State," in favor of the latter, whether he was plaintiff or defendant, upon certain conditions. It was held in *Case v. Douglas*, (1 *Dillon*, 299,) that the settled construction of the former Acts was applicable to and governed this; and, in the case of *The Sewing Machine Com-*

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*panies*, (18 Wall., 553,) the Supreme Court held the same view. Mr. Justice Clifford, in giving the opinion of the Court, says: "A suit by a plaintiff against a defendant,' must mean substantially the same thing, in the practical sense, as 'a suit in which there is controversy between the parties.'" The change of expression introduced in the Act of 1875 does not, as it seems to me, affect this principle of construction. "A controversy between citizens of different States" must mean substantially the same thing, as to the diversity of citizenship extending to every person who is a party on the other side. The new phrase merely omits one qualification expressed in the other phrase. It is no longer necessary that one party should be a citizen of the State in which the suit is brought. He may be a citizen of any State, if the other party be not a citizen of that State, but of another. But this leaves untouched the principle established by the cases, that the party on each side, though consisting of several individuals, is, for that purpose, to be regarded as one, and that each individual must possess the requisite citizenship. The changes introduced, by this part of the section of the Act in question, are, that either party, plaintiff or defendant, may remove the cause, and that it is no longer necessary that either party shall be a citizen of the State in which the suit is brought. It still remains necessary that each individual plaintiff shall be of different State citizenship from that of each individual defendant, to authorize a removal under this part of the Act.

The principle running through all the cases which have been referred to is, that the requisite jurisdictional citizenship must exist as to each individual plaintiff or defendant; and that what would be necessary if there were but one individual on each side remains necessary, as to each individual, when there are more than one. This construction does not appear to rest so much upon the particular words employed in the several statutes, as upon the acceptance of the general idea, that, when jurisdiction depends alone upon citizenship, the fact that it exists as to one person does not in the least afford a foundation for asserting it over another. The fact of citizenship is en-

tirely personal, and so is the grant of jurisdiction, founded upon the fact. This view appears to me to be disclosed in, and to have been acted upon in, all the cases, from *Strawbridge v. Curtiss*, (3 *Cranch*, 267,) the earliest, down to *The Sewing Machine Companies*, (18 *Wallace*, 553.)

The phrase of the Judiciary Act, "a suit commenced by a citizen of a State in which the suit is brought, against a citizen of another State," and that of the Act of 1867, "a suit in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," have been held alike to require the jurisdictional citizenship in each individual. In the last phrase, if we say, "a controversy between a citizen of one State and a citizen of another State," we drop out the requirement of citizenship in the State where the suit is brought, but make no other change, and certainly none in the necessity of the construction so long established, as to the requisite citizenship of each individual. On that point there is no room for discrimination. The present Act embodies precisely this idea, neither more nor less, conveying it in fewer words—"a controversy between citizens of different States." When there is such a controversy, either party may remove it. Either party to the controversy includes each individual on the one or the other side; and, on the principles of the adjudged cases, the jurisdictional requirement must exist in respect to each individual. The difference of citizenship must exist between the plaintiffs, on the one hand, and the defendants, on the other. Diversity of citizenship, as to those between whom the controversy exists, is alone regarded. Nothing is affirmed as to diversity of citizenship between the plaintiffs, on the one hand, alone, and between the defendants alone, on the other; for, between them there would be no controversy. Yet, upon the construction claimed by the defendants, such a diversity necessarily carries the right of jurisdiction to the Circuit Court; for, upon that construction, if one plaintiff is of different State citizenship from the others, then, whatever may be the citizenship of the defendants, whether of one or more States, there will be a controversy

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between citizens of different States. Thus, the word "controversy" will be eliminated from the case of jurisdiction, and that will attach, whenever the individuals engaged in a suit include citizens of more than one State. Unless the construction is adopted which requires the jurisdictional fact to exist as to each individual among the parties, every litigation may be originally commenced in, or may be drawn to, the Courts of the United States, in which any individual among the plaintiffs or defendants is of a different State citizenship from a single individual of the other party. If all the individuals who are plaintiffs, except one, are citizens of New York, and they bring their suit, in the Courts of New York, against defendants all of whom are citizens of New York, upon the construction which I think should be rejected, the defendants could remove the cause into the Circuit Court of the United States, and it might originally have been brought in that Court. Such a case does not, in my opinion, present a controversy between citizens of different States, within the meaning of either the Constitution or the laws.

It is suggested, that the nature of the claim, being for a conversion of personal property, and, therefore, maintainable against either defendant alone, is material. But, to this it must be answered, that the plaintiffs have the election to proceed in the same suit against all the defendants; and that the defendants have sought and obtained the removal in their joint right, and upon their joint application. The case discloses but one controversy, and that can be fully determined only between all the parties. (*Smith v. Rines*, 2 *Sumner*, 338.) In my opinion, these cases were not rightfully removed into this Court, and should be remanded to the Supreme Court of New York.

*Clark Mason*, for the plaintiffs.

*James S. Stearns*, for the defendants.

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In the Matter of Henry A. Mann, an alleged Bankrupt.

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## IN THE MATTER OF HENRY A. MANN, AN ALLEGED BANKRUPT.

In a petition in involuntary bankruptcy, under § 39 of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 536), as amended by § 12 of the Act of June 22d, 1874, (18 *Id.* 180), it is sufficient to state upon belief, without averring either knowledge or information, that the petitioning creditors constitute the required number, and that their debts constitute the required amount.

Where the petition is in such form, the oath to it is not insufficient, if it is the form of oath prescribed in Form No. 54 of the Forms in Bankruptcy, although such form of oath purports to cover only matters which are stated on knowledge and matters which are stated on information and belief. .

(Before JOHNSON, J., Northern District of New York, June 7th, 1876.)

JOHNSON, J. The petition of review brings up for consideration the decision of the District Judge upon a demurrer to a petition in involuntary bankruptcy. The alleged defect in the petition consists in this, that the creditor's petition states upon belief, without alleging either knowledge or information, that she constitutes one-fourth in number of the creditors of the alleged bankrupt whose demands exceed \$250 and are provable; and that her demand constitutes one-third of the provable debts, under the Act.

The 32d of the General Orders in bankruptcy, adopted by the Supreme Court, April 12th, 1875, ordains, that the several Forms specified in the schedules annexed to the former General Orders, for the several purposes therein stated, shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case. Among the Forms thus sanctioned was that of a creditor's petition, No. 54, in which is contained the allegation of the petitioning creditor, that he "believes" that said debtor "owes debts to an amount exceeding the sum of three hundred dollars." Now, that circumstance is as essential as any other to make out a case for involuntary bankruptcy under the statute. It is sufficiently averred, as matter of pleading, by the averment that

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In the Matter of Henry A. Mann, an alleged Bankrupt.

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the petitioner so believes. If we look to the reason of it, belief upon such a subject is all that, in the nature of things, a stranger can have. Information is important only as leading to belief, unless the sources of information, and the details obtained, are to be set forth, and the Court is to judge as to the greater or less probability of truth of the information obtained. But, as pleading, this is quite irrelevant. In pleading, the party is to make his allegations, upon subjects that lie within his personal knowledge, positively, but, upon other points, belief, equally with information and belief, suffices to present an issue. The facts stated on belief in this case, which have been before adverted to, relating to the question whether a sufficient proportion, in number and amount, of creditors have united in the petition, are of the same general character as that fact which the Supreme Court has directed to be stated on belief. It is, at least, as easy for a petitioning creditor to know, or to be informed, that the debtor owes more than \$300, as it is that he should know, or be informed, that one-fourth in number and one-third in amount of creditors have united in the petition; and the same reason which makes the former sufficient ought to cover the latter.

The special provision of the statute, enabling the debtor to controvert this particular allegation, and the Court in that case to require of him a complete list of his creditors, and the further provision, that, in case a sufficient number and amount of creditors have not joined, a reasonable time shall be granted for other creditors to unite in the petition, seem to me to show that no substantial purpose would be served in holding that an averment on belief is not sufficient.

There is no novelty in holding, that, as matter of pleading, an allegation upon belief is sufficient. Such was the established rule in respect to sworn pleadings in the Court of Chancery in New York, where the matters stated, charged, averred, admitted or denied, were required to be stated positively, or upon information or belief only, according to the fact. (*N. Y. Ch'y Rules, No. 18, ed. 1839*;) and either mode of statement was sufficient as a pleading.



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*In re Joliet Iron & Steel Co.*, (10 *Nat. Bkcy. Reg.*, 60;) *In re Scammon*, (*Id.*, 67;) *In re Scull*, (*Id.*, 165,) and *In re Keeler*, (*Id.*, 419,) are not inconsistent with the views before expressed. None of them goes further than to hold that an allegation on information and belief is sufficient, but none of them declares an allegation on belief alone to be insufficient.

In respect to the form of the verification, if that question arises on demurrer, (*In re Simmons*, 10 *Nat. Bkcy. Reg.*, 253,) it is that prescribed by the Supreme Court in the Form before referred to; and any criticism in respect to the facts stated on belief alone in this case, as not covered by the form of the verification, would be alike applicable to the Form sanctioned by the General Orders in bankruptcy.

I am, therefore, of opinion, that the learned District Judge ought not to have allowed the demurrer; that his order thereupon ought to be reversed; that the allegations of the petition in that behalf should be deemed sufficient; and that the proceedings should be remitted to the District Court, to be proceeded in according to law.

*E. F. Bullard*, for the petitioners.

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MICHAEL DOWDALL

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

In the trial before a jury, of an action at law to recover damages for the loss of the plaintiff's canal-boat, through the negligence of the defendant, while being towed by the defendant, the boat, which was loaded with coal, having struck the spiles of a bridge and sunk, the plaintiff, on being examined as a witness, testified, under objection, that he afterwards had a conversation with a person who was the agent of the defendant in regard to tow-boats, and he

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said that the boat was sunk, and that it would cost more to raise her than she was worth, and that he regarded her as a total loss: *Held*, that the evidence was competent.

The statement was within the scope of his agency, there had been time for the agent to make an examination, and it is to be assumed that he had made one; nor was it a subject in relation to which it was necessary to be shown that the person speaking was an expert.

A party claiming a total loss of his vessel must prove either an actual total loss, or that it would cost more to raise and repair the vessel than she would be worth when repaired. The burden of proof is upon him.

The facts, that the boat was struck, and filled and sank to the bottom of a river in which the tide ebbed and flowed, and that, after the lapse of sufficient time to ascertain the facts, the agent of the party causing the injury declared to the owner that she was a total loss, and that it would cost more to repair her than she would be worth when repaired, were evidence to justify a submission of the question to the jury.

The fact that the boat was proved to have been subsequently seen lying in the harbor of New York, slightly repaired and lying in the mud, did not necessarily alter the result. The whole evidence was proper for the jury.

On the question of the actual market value of the boat at the time of her loss, it was competent evidence for the plaintiff to testify as to what he had paid for her and what he had expended upon her.

(Before HUNT, J., Eastern District of New York, June 9th, 1876.)

HUNT, J. This is a motion for a new trial, on a bill of exceptions. The case was tried before a jury, in June, 1875, and resulted in the finding of a verdict for the plaintiff, for eight hundred dollars. The action was to recover damages for the loss of the canal-boat of the plaintiff, through the negligence of the defendant, while being towed by the defendant from the city of New Brunswick to the city of New York. The defendant has made a bill of exceptions, obtained a stay of proceedings, and now presents his case upon the motion for a new trial.

The first objection is to the admission of the evidence founded upon the statement of Mr. Jarrard. The plaintiff commenced his case by calling the master of the boat alleged to have been injured, who testified to the circumstances resulting in her striking against the spiles of the bridge, and that she went down to the bottom of the river. She was loaded with coal, and was being towed by one of the defendant's tow-

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boats through the Hackensack river, when the accident occurred; and it was in that river that she sank. The witness then added: "I saw Mr. Jarrard and Mr. Stevens. Mr. Jarrard is agent for the company, and Mr. Stevens superintendent. I saw Mr. Jarrard at New Brunswick. He is agent of the company in regard to tow-boats. He told me to see Mr. Stevens at Hoboken." Mr. Dowdall, the plaintiff, was then called, who testified as follows: "I had a conversation with Mr. Jarrard. He told me that the boat was sunk, and that it would cost more to raise her than she was worth, and that he regarded the boat as a total loss. I then went to see Mr. Stevens, and he sent me back to Mr. Jarrard." The admission of this evidence forms the ground of the first exception by the defendant.

This objection is attempted to be sustained upon different grounds. Thus, it is said: 1st, that the statement is not of such a nature as would bind a principal, by the laws of agency; 2d, that it does not appear that it was within the personal knowledge of the agent; 3d, that it does not appear that it was within the scope of his agency; 4th, that it was not a part of the *res gestæ*; 5th, that an admission is not competent evidence of a fact which might be proved by direct testimony; and, 6th, that this evidence became incompetent when it appeared afterwards that the boat was in fact raised and brought to New York.

It had been proved already, that one of these men, Jarrard, was the agent of the company in regard to tow-boats, and that, upon application to this agent, he referred the plaintiff to the other agent, Stevens, who was the superintendent of the company. We are to assume of these men, as of other agents of railroad companies, first, that they speak for and represent their principals within their agency; and, second, that they act in the interests of their principals—at least, that they do not intentionally favor others at the expense of their principals. Here is the case—not an uncommon one—of a man whose boat has been sunk while in the charge of the company. She goes to the bottom of the river and lies there. What is the

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owner to do? Shall he rush to a lawyer's office and order a suit to be commenced, or shall he apply to the company for redress? He wisely takes the latter course. To whom shall he apply? One would say, to those agents having in charge the subject of towing boats. This accident happened in the State of New Jersey, and, from the name of the company, we may suppose that its principal place of business, and its president and secretaries, would not be found in that State. The agent in respect to towing boats, and the superintendent of the company, are found, and from one of these he is referred to the other. When he there makes application, it seems to have been already ascertained that the accident had occurred, and what were its results. We are not to assume that Mr. Jarrard, the agent of the company, would make the positive statements he did, unless he had examined into the case. We cannot suppose him thus ready to favor a stranger at the expense of his employer, unless he had ascertained that it was his duty to do so. Apparently, he had informed himself of the state of the case, as, without making further inquiries, he informed the plaintiff, as of his own knowledge, that the boat was sunk, that it would cost more to raise her than she was worth, and that he regarded her as a total loss.

I cannot think it necessary to the competency of an admission, that the party making it shall be shown to be an expert on the subject of the evidence admitted. If the case had been reversed, and Dowdall had admitted that the expense of raising would have been less than the value of the boat when raised, the evidence would have been competent. It would not have been conclusive, and he might have shown the truth in opposition to his admission, as the defendant might have done here, but, it would have been good as far as it went.

The subject-matter of the admission appears to have been more within the department of the agent of the tow-boats of the company, than of any other agent or officer. It was his duty to see to this subject, and to see that, in respect to boats to be towed, the interests of the company were protected.

That this boat was subsequently raised and brought to the

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city of New York, is a circumstance affecting the weight, and not the competency, of the evidence. I shall have occasion to refer to this subject further, in considering the objection to the charge, on the point of a constructive total loss.

The second objection also arises upon the testimony of the plaintiff, Dowdall. He says: "The value of the boat was fifteen hundred dollars. She was worth that to me." This was objected to by the defendant's counsel, and an exception taken. The witness proceeded: "I paid seven hundred dollars, and laid out three or four hundred dollars." This was also objected to, the objection was overruled, and the defendant excepted. The defendant's argument, that the actual market value of the boat at the time of the injury furnishes the rule of damages, is certainly a sound one. What the plaintiff paid for her, or what repairs he put upon her, do not necessarily establish her value. Nevertheless, these are competent facts, as bearing upon the question of actual value. What an article will sell for is a good test of value; and what the boat sold for, when the plaintiff bought her, is one of those tests. It is not conclusive. He may have paid an extravagant price, he may have made a very good bargain, or the circumstances may now be very different. So, his expenditures upon her enter into the same view. If she was worth a certain sum when he bought her, it is not an unreasonable argument that the expenditure of \$300 upon her added so much to her value. It was for the jury to determine. It was never doubted, that what the plaintiff gave for his boat or his horse or his carriage, within a short time before the injury to it, is competent evidence on the question of value. The practice on that point, at jury trials, is believed to be uniform.

The statement that the boat was worth the sum stated, to him, the plaintiff, was not specially excepted to. It is quite likely, that, if attention had been called to that expression, the Court would have limited the evidence to the value of the boat generally and not its value to the plaintiff. The exception was general, to the plaintiff's evidence that the boat was worth \$1,500, as well as that she was worth that sum "to me."

The remaining exception is to the charge of the judge.

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Among other things, the jury were charged as follows: "If you hold, that, upon the proof, the plaintiff is entitled to recover, the next question is as to the amount of such recovery. On that point, I charge you, that the rule of damages is this— 1. If the boat was sunk, and was totally lost in fact, the plaintiff is entitled to recover her actual value at that time; 2. If she was not actually and totally lost, but was in such a condition that the expense of raising and repairing her would exceed her value when so repaired, then the plaintiff can recover her actual value at the time of the injury." The defendant objected and excepted to the submission of the question of value to the jury, on the ground that there was no evidence of total loss or of the cost of recovery and repair. In connection with this exception, the defendant's counsel requested the Court to charge the jury, that the recovery should be for nominal damages only, which request was refused.

At the trial and upon the present argument, the counsel for the defendant conceded that the law as announced by the Court was correctly announced, but insisted that there were no facts found, and no competent evidence before the jury, to which such principles could be applied. If this contention is well taken, there was doubtless an error for which a new trial must be awarded. It was proven, that, after receiving the injury, the boat filled and sank to the bottom of the Hackensack river. We are not informed of the depth of the water in this river, and only know of it that it is a river in which the tide rises to the height usual in the latitude of New York, and runs with force at the point in question, and that it is one of the great highways of internal traffic. After the boat was so sunk, and after the lapse of sufficient time to procure the presence of her owner, and for him to call upon the different agents of the defendant in New Jersey, involving probably a period of several days, the jury were justified in believing that those agents made an examination of the boat, as she lay in the river. They must be supposed to be familiar with the river, with its depths, its tides, the means and expenses of raising boats, and the expense of repairing boats that had been stove and sunk. It was both their duty and their interest to ascertain the actual

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injuries to this boat. They had all the means of ascertaining the actual injury, and of judging of the cost of repairing her, and the jury had the right to assume that they would not adjudge and declare until they had made the necessary examination. Such agent did then and there, under these circumstances, declare to the plaintiff, that his boat was a total loss, and that it would cost more to raise and repair her than she would be worth when raised and repaired. I am of opinion that the plaintiff had a right to rely upon this declaration, and that these facts and circumstances afforded evidence to the jury on which they might find that there was a total loss of the boat. If there was such evidence, then it was for the jury to decide whether or not it was overborne by the fact of the subsequent appearance of the boat in the Hudson river. It was proven, that, a year after the accident, to wit, in the fall of 1874, a witness saw the boat in the Hudson river between 56th and 57th streets, New York, and that he saw her again in the same place, a few days before the trial, which took place in June, 1875. A piece of plank had been put on her and a piece of timber had been put in her, and she laid in this condition, in the mud. It did not appear who had removed the boat, or who had repaired her, whether, after an attempted repair, she was found to be of any value, or whether she had been again abandoned and left to rot in the mud, as of no value to any one.

Assuming, as the defendant's counsel is justified in doing, that it was the duty of the plaintiff to establish his case, and that, if he claimed a total loss, it was for him to establish the facts which would justify that claim, I am still of the opinion that a *prima facie* case was made by him, and that the case was not necessarily, and as matter of law, overthrown by proof of the subsequent condition of the boat. It left the case, upon the whole evidence, for the judgment of the jury, and I see no occasion to interfere with the decision made by it.

*Timothy C. Cronin*, for the plaintiff.

*Charles H. Woodruff*, for the defendant.

## THE CITY OF WASHINGTON.

Under § 829 of the Revised Statutes, which provides, that, "when the debt or claim in Admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission," the marshal is entitled to such commission, in a suit *in rem*, against a vessel, if process is issued, and a bond to the marshal is given under the Act of March 3d, 1847, (9 *U. S. Stat at Large*, 181,) (now § 941 of the Revised Statutes,) although the service of the process is waived and the vessel is not actually seized under the process.

Under said § 829, where the amount of a final decree is paid before execution, the debt or claim is "settled."

(Before BENEDICT, J., Eastern District of New York, June 13th, 1876.)

BENEDICT, J. This is an appeal from the clerk's taxation of the marshal's costs. It appears that a libel was filed against the City of Washington, and process *in rem* issued against that vessel, on April 3d. On April 4th, before the process was served, service of the process was waived, and the claimants gave a bond, under the provisions of the Act of March 3d, 1847, (9 *U. S. Stat. at Large*, 181). Such bond was given and filed on April 4th. Thereafter the case proceeded to a final decree, the amount of which having been paid, the marshal now claims his commission thereon, according to the provisions of section 829 of the Revised Statutes, which provides, that, "when the debt or claim in Admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission." To this it is objected, that there can be no allowance to the marshal, because he made no seizure of the vessel.

The provision of the statute which gives to the marshal a commission is applicable to all cases where the debt is settled by the parties without a sale. There are no other terms of limitation. Nevertheless, I cannot think it was intended to apply where no service is performed, or responsibility assumed, by the marshal. If, therefore, this were a case where process



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The City of Washington.

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against the vessel had never been issued, and a stipulation for value had been given under the Rules, I should have little hesitation in determining that the marshal would not be entitled to his commission, upon the ground that, in such a case, the marshal would perform no service and incur no responsibility, to afford foundation for a claim to compensation. But, in this case, process was issued, and thereafter a bond to the marshal was given, in which it is recited that the marshal has possession of the vessel. The recital is inaccurate, as the marshal never in fact had possession of the vessel. The statute makes it the duty of the marshal to stay the execution of the process upon receiving the statutory bond, and compels him to receive a bond when tendered in pursuance of the Act, in lieu of a seizure of the vessel; which bond he is to return to the Court. Where such a bond is given, the marshal must, therefore, exercise some judgment, and he is compelled to take some risk in respect to the form of the bond, &c., and he must make a return. Some service is, therefore, in such a case, performed, and some risk encountered, by the marshal, for which he is entitled to compensation. The provision for paying the marshal a commission on the amount is without any words limiting the allowance to cases where the vessel has been actually seized, and the intent appears to be to give the marshal a commission in all cases where he performs any service which affords the basis for a claim to compensation. I am of the opinion that he is entitled to his commission, when a bond under the Act of 1847 is received, although service of the process by seizure of the vessel is stayed, and that this right is not affected by the circumstance that, in practice, the bond under the Act of 1847 is ordinarily filed in the clerk's office by the claimant. Although filed in the clerk's office after approval, it is still a bond to the marshal, as obligee, and is deemed to be taken and returned by the marshal, who, upon his own responsibility, stays the execution of the process. The marshal is, therefore, in this case, entitled to his commission, provided the case is one where the debt or claim has been settled by the parties, within the meaning of the

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section. It has been heretofore held by Judge Blatchford, that, when the amount of a final decree is paid before execution, the debt or claim is settled, within the meaning of section 829, (*The Russia*, 5 *Benedict*, 84); and such is also my opinion.

For the reasons above given, I am, therefore, of the opinion that the marshal is entitled to his commission in this case, and the taxation is affirmed.

*John J. Allen*, for the marshal.

*Platt & Gerard*, for the claimants.

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JOHN G. STEVENS AND OTHERS

vs.

THE NEW YORK AND OSWEGO MIDLAND RAILROAD COMPANY  
AND OTHERS. IN EQUITY.

In directing the order of distribution, in a foreclosure suit, of the proceeds of the sale of the road and other property of a railroad corporation, mortgaged by it to trustees to secure the principal and interest due on registered and coupon bonds, it was provided, that unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest had been paid, should be paid before coupons or interest falling due at a later period, and before the principal of any of the bonds; and that coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds.

The mortgage provided, that, after default, the mortgagees should sell so much of the mortgaged property as should "be necessary to pay and discharge the principal and interest, according to the tenor thereof," of all the bonds issued, and there was no provision in the mortgage for a *pro rata* dividend of the proceeds of sale among all the bonds and their accrued interest.

(Before BLATCHFORD, J., Southern District of New York, June 14th, 1876.)

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BLATCHFORD, J. In deciding, in March last, various questions raised in this case, I held that the coupons due July 1st, 1873, were not paid by the company or extinguished, and that they are valid in the hands of those who hold them (as between such holders and the holders of others of the bonds and coupons) to the extent of the sums for which they hold them as collateral security, if less than the face of the coupons, and, if greater, to the extent of the face of the coupons. Further consideration has confirmed me in the foregoing conclusion.

I further held that unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest has been paid, should be paid before coupons or interest falling due at a later date, and before the principal of any of the bonds; and that coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds are paid. I have heard a re-argument of this question. The effect of the decision, as stated by those who are dissatisfied with it, is, that unpaid coupons or interest not maturing on or after January 1st, 1874, will be paid in the order in which they became collectible down to and including July 1st, 1873, and before payment of anything on the bonds. It appears that the unpaid interest which fell due January 1st, 1870, is \$350 of coupons; July 1st, 1870, \$70 of coupons; January 1st, 1871, \$56 of coupons; July 1st, 1871, \$185 50 of coupons; January 1st, 1872, \$416 50 of coupons; July 1st, 1872, \$12,246 50 of coupons, and \$35 of interest on registered bonds; January 1st, 1873, \$16,982 of coupons and \$70 of interest on registered bonds; and July 1st, 1873, \$265,540 50 of coupons and \$70 of interest on registered bonds. The entire interest which fell due on and after January 1st, 1874, is unpaid, being, for each semi-annual instalment, \$265,424 of coupons and \$14,576 of interest on registered bonds. The total semi-annual interest was \$280,000.

Of the unpaid interest which fell due before July 1st, 1873, \$30,411 50 is in coupons, and \$105 in interest on registered bonds. There is no proof of the present ownership or

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condition of any of the \$30,411 50 of coupons, and no evidence as to whether they have been detached or not from the bonds with which they were issued. Of the unpaid interest which fell due July 1st, 1873, \$265,540 50 is in coupons, and \$70 in interest on registered bonds. No coupons which fell due July 1st, 1873, were paid, but all of them were at that time detached from the bonds with which they were issued, and became the property of parties, named in the evidence, other than the parties who continued to hold such bonds and the unmatured coupons belonging and attached thereto. Of the interest on registered bonds which fell due July 1st, 1873, \$14,388 50 was paid.

It is contended that there is no principle, legal or equitable, which entitles the interest which matured before July 1st, 1873, to be paid in the order in which it fell due, and before payment of any of the bonds; that is not shown that payment of the interest was ever demanded and refused; that no right to be paid the interest accrued until demand and refusal; that, until then, the debtor was not in default; that the debtor was justified in paying subsequently maturing interest, even though prior maturing interest remained unpaid, so long as the payment of such prior maturing interest had not been demanded; that he is prior in right who is prior in the time of presenting his demand, when presentment is required; and that those who, prior to July 1st, 1873, received their interest, received no preference as against those who did not receive their interest, because the latter did not demand it and the former did.

It is further contended, that the foregoing views apply equally to the interest which matured July 1st, 1873; that there is no proof that payment of any of such interest was ever demanded from the debtor; and that, as to the unpaid coupons which matured July 1st, 1873, the present holders of them, as purchasers of them from the parties for whom they cashed them at their face value, acquired, as against such parties as still holding the bonds from which such coupons were detached, only the right to present the coupons for payment and

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to receive payment. The general principle is invoked, that, where several debts are secured by one and the same mortgage, and become due, and the mortgage is then foreclosed, they will be paid *pro rata* from the fund, if it is insufficient to pay the whole of them; and it is contended that the only exception to this rule is, where the mortgage, by its terms, creates a preference in favor of some of the debts, or where the original creditor, as to any which he has assigned, has designed to confer a right of prior satisfaction on the assignee. This general principle being applied in the proposed decree in this case to all the interest which matured after July 1st, 1873, and such interest being required to be paid *pro rata* with the principal of the bonds, it is contended that a different rule ought not to be applied to the interest which matured on and before July 1st, 1873. The principal contest is as to the preference claimed for the \$265,540 50 of unpaid coupons which fell due July 1st, 1873, the amount of all the other unpaid interest which fell due on or before July 1st, 1873, being only \$30,482 50.

The bill in this case sets forth that the debtor made default, on the 1st of July, 1873, in the payment of the coupons which became due on that day, and has never paid any of such coupons. As the bill is filed by the trustees under the mortgage, who represent the bondholders, I think this averment in the bill is properly to be taken, as against the bondholders, as an averment that the coupons which fell due July 1st, 1873, were presented, and payment of them demanded and refused, and thus default was made, inasmuch as every bond with coupons attached to it provides that the interest is payable on presentation of the coupons. But, in addition to this, I am of opinion that the transactions between the debtor and the parties who furnished the money to cash the coupons were such as to amount either to a waiver, on the part of the debtor, of the presentment of the coupons, because of a previous mutual understanding that they could not, and would not, be paid if presented, or to an actual demand and refusal.

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In support of the preference claimed it is contended, that, as to interest which matured at any given time on and prior to July 1st, 1873, inasmuch as some of the parties entitled to receive such interest received it from the debtor, and some did not, the former will have received a preference, unless the latter are now to be put on an equal footing with them. To this it is replied, that there really was no preference; that, so long as the debtor was solvent, every party entitled to interest was paid as he presented his matured claim; that, if he did not present it, he took the risk of the debtor's becoming insolvent; and that he had no special property in, or lien on, the funds of the debtor, which could require the debtor to set apart funds sufficient to pay undemanded matured interest which fell due at an earlier date, before paying demanded matured interest falling due at a later date.

I do not think any distinction can be made between interest which matured before July 1st, 1873, and interest which matured on that day, growing out of the fact that payment of the latter was demanded and refused, or a demand was waived, and that the former was not demanded. I do not see how any diligence of those of a given class who were paid their interest, in asking to have it paid, can be imputed as laches to others of the same class who did not ask to be paid their interest, so as to work a virtual preference in favor of the former. To give to the latter their interest in full, before paying the principal of the bonds, is only to put all those in a given class entitled to interest on an equal footing; and to put them on such equal footing requires, also, that interest maturing at an earlier date shall be paid before interest maturing at a later date. Here are special equities, it seems to me, which would be violated, if such an inequality were left to exist as the exclusion from the full payment of interest of some of a given class. There is nothing in the terms of the mortgage, in this case, which requires such exclusion. On the contrary, the mortgage provides, that, after default, the mortgagees shall sell so much of the mortgaged property "as shall be necessary to pay and discharge the

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principal and interest, according to the tenor thereof," of all the bonds issued, and shall, out of the moneys arising from such sale, pay the principal and interest which shall then remain due and unpaid on the issued bonds. The words, "according to the tenor thereof," may very well be held to embrace the payment of interest, according to the times of the semi-annual recurrences of interest, and in such order. Certainly, there is nothing in those words, or elsewhere, in the mortgage, that forbids a course which is absolutely necessary, unless a result is to be effected which will not be a payment of interest according to the tenor of the bonds, but will leave some part of a given instalment of interest paid in full, and the rest of it not paid in full. In the case of *Dunham v. Railway Co.*, (1 Wallace, 254,) the mortgage provided, that, in case of default and a sale, all bonds, and the interest accrued thereon, should be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of sale. Hence it was held that there could be no preference of past due coupons over the principal of the bonds.

No case was cited on the argument which decides the above question adversely to the view I take. Most of the cases cited were not cases of coupons or interest on numerous bonds secured by mortgage, and none of them were cases where some interest in a given class had been paid and the rest not paid, and the fund was insufficient to pay all the principal and interest due. The case of *Sewell v. Brainerd*, (38 Vermont, 364,) was not such a case, nor was the case of *Miller v. Rutland & Washington R. R. Co.*, (40 Vermont, 399;) and, in the latter case, no preference was claimed.

The above views cover all the questions involved. But, as to the holders of the unpaid coupons of July 1st, 1873, there seems to me to be a special equity. It was through the advance of money to cash those coupons in the hands of the holders of the bonds to which they belonged, that such holders obtained the money for those coupons. On such advance, those coupons passed into the hands of those who now hold them. But for such advance, the coupons in the hands of the

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original holders of them would not have been worth their face value, as they were made to be by such advance. The original holders of such coupons must be regarded as still holding the bonds to which such coupons belonged, or, if not, those who hold such bonds and subsequently maturing coupons belonging thereto must be held to be subject to the same equities with such original holders. No special reasons are shown, in the evidence, why, as against any of such holders, the present holders of the coupons of July 1st, 1873, are estopped from claiming priority. Those who had their coupons of July 1st, 1873, cashed by means of such advance, retained the money, and, to permit them now to exclude the holders of such coupons from being paid in full, and put on an equality with the registered interest of July 1st, 1873, which was paid in full, would be to permit them to work an inequality which would be unjust.

*James Emott*, for the priority.

*Francis N. Bangs*, opposed.

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THE UNITED STATES vs. EDWARD B. FOOTE.

In an indictment under § 3893 of the Revised Statutes, charging the defendant with depositing in the mail an obscene pamphlet, and also with depositing in the mail a notice giving information how an article designed for the prevention of conception can be obtained, it is not necessary or proper that the indictment should give a definite or detailed description of the pamphlet.

Sufficient information as to the particular article about which evidence is to be given can be obtained by an order for a bill of particulars, and for the exhibition to the defendant of the article itself.

A notice in the form of a letter enclosed in a sealed envelope, if it gives the prohibited information, is within the scope of the statute.



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A written slip of paper, without address or signature, giving the prohibited information, is a "notice," within the meaning of the statute, although not volunteered, but sent in reply to a letter asking for the information.

(Before BENEDICT, J., Southern District of New York, June 17th, 1876.)

BENEDICT, J. This case comes before the Court upon a motion to quash an indictment. The questions argued by the counsel are presented to the Court upon the indictment, and the bill of particulars filed by the prosecution, in which the accused is charged, under § 3893 of the Revised Statutes, with depositing, and causing to be deposited, in the mail, an obscene pamphlet, and, also, in a different count, with depositing in the mail a notice giving information how an article designed for the prevention of conception can be obtained.

The first ground of objection taken to the indictment is, that it fails to give a definite description of the pamphlet alleged to have been mailed. In respect to this ground of objection, I have only to repeat what I have had occasion many times to say in Court, that, in cases of this description, it is neither necessary nor proper to pollute the record by a detailed description of obscene matter, and, where the grand jury omit a definite description of the matter, by reason of its obscene and filthy character, such omission furnishes no ground of objection to the indictment. Sufficient information as to the particular article about which evidence is to be given, can be obtained by an order for a bill of particulars, and for the exhibition to the defendant of the article itself. This practice has been repeatedly followed, and has been found adequate to the protection of the accused, while, at the same time, to a certain extent, it prevents the proceedings from being the vehicle of spreading obscenity before the public. The accused, his counsel, the district attorney, the jury and the Court must necessarily have knowledge of the obscene matter forming the subject of the charge. Experience has shown that it is entirely possible to go through with a trial of this character without extending that knowledge beyond the limits indicated, and at the same time do full justice.

The next objection raises the question, whether a notice giving information when or how the prohibited articles may be obtained is within the scope of the statute, when such notice is in the form of a letter enclosed in a sealed envelope. The argument is, that no public information is given by such a letter, and that the subsequent mention in the statute, of letters on the envelope of which indecent matter is written, indicates an intention not to interfere with letters by reason of their contents, and shows that the word "notice" was not intended to cover a letter enclosed in an envelope. I cannot accede to this construction. The object of the statute is not to protect the morals of post office employees, but to prevent the mails of the United States from being the effectual aid of persons engaged in a nefarious business, by being used to distribute their obscene wares. To exclude from the statute all letters which, to the outward appearance, are harmless, would destroy its efficacy, for, everything would then take the form of a sealed letter. It is not the form in which the matter is mailed, but the character of the matter itself, which fixes the criminality of the act.

The last ground of objection rests upon the fact, admitted here, that the subject-matter charged in the indictment as a notice was a written slip of paper, without address or signature, mailed by the accused in answer to a letter received by him asking for the information which is given in writing upon the slip of paper. It is not disputed that the writing on the slip gives information as to how one of the prohibited articles may be obtained, but it is contended that such a writing is not a "notice," within the meaning of the statute, because it was not volunteered, but sent in reply to an inquiry. No such limited signification as is contended for can be given to the word "notice." "Notice" means "information, by whatever means communicated; knowledge given or received;" also, "a paper that communicates information." (*Webster's* and *Worcester's Dictionaries*.) The paper in question is within this definition. It gives the information specified by the Act, and is plainly within the statute, for, by its terms, the statute

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Wright v. Blakeslee.

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covers every kind of notice, whereby is given, either directly or indirectly, information such as this slip affords.

It is said, that, unless some such limitation be given to the language of the statute, medical advice given by a physician in reply to the inquiry of a patient would be excluded from the mails. It is not seen that any considerable inconvenience would arise if such were the result, as other means of communication may be resorted to by physicians, while it is plain that any attempt to exclude information given by medical men from the operation of the statute would afford an easy way of nullifying the law. If the intention had been to exclude the communications of physicians from the operation of the Act, it was, certainly, easy to say so. In the absence of any words of limitation, the language used must be given its full and natural significance, and held to exclude from the mails every form of notice whereby the prohibited information is conveyed.

*Benjamin B. Foster, (Assistant District Attorney), for the United States.*

*Thomas Harland, for the defendant.*

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B. HUNTINGTON WRIGHT vs. LEVI BLAKESLEE.

Under § 127 of the Act of June 30th, 1864, (13 U. S. Stat. at Large, 287,) where, under the will of a testator who died before the Act was passed, a person became beneficially entitled in possession, after the Act was passed, to real estate, upon the death of another person who died after the Act was passed, and who had by such will a life estate in such real estate: *Held*, that such beneficial interest in possession was a "succession" conferred by such will, and was subject, under § 133 of said Act, to a succession tax.

(Before WALLACE, J., Northern District of New York, June 20th, 1876.)

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THIS was an action of assumpsit, to recover the amount of a succession tax, paid under protest, assessed upon the assignors of the plaintiff. It was tried by the Court without jury.

*Risley, Stoddard & Matteson*, for the plaintiff.

*Richard Crowley*, (*District Attorney*), for the defendant.

WALLACE, J. Section 127 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 287,) provides, "that every past or future disposition of real estate, by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this Act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession,' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the grantor, testator, ancestor, or other person, from whom the interest of the successor has been or shall be derived." Section 133 declares, that "there shall be levied and paid to the United States, in respect of every such succession as aforesaid, according to the value thereof, the following duties, viz.: where the successor shall be the lineal issue, or lineal ancestor, of the predecessor, a duty at the rate of one dollar *per centum* upon such value." The assignors of the plaintiff were the children of Henrietta Huntington, a devisee under the will of her father, by reason of a provision in his will substantially as follows: "In case my daughter Henrietta shall, at the time of my decease, be *feme covert*, I give and devise unto my executors one other of the said equal parts or shares of the residue of my estate, in trust to receive the rents and profits, and apply the same to her sole and separate use during the term of her natural life, and, at her decease, if she shall leave issue her surviving, I devise the said share to her issue, their heirs and assigns, in full and absolute possession." The testator died in 1846, said Henrietta being a *feme covert*. She died after the passage

of the Act. These being the facts, the assessor insisted upon payment of a tax of one dollar *per centum* on the value of the succession.

It seems very clear, that, by a past disposition of real estate by will, the assignors of the plaintiff had a vested estate in expectancy during the life of their mother, and, upon her death, after the Act was passed, became "beneficially entitled in possession" to the real estate. The concurrence of these conditions conferred on the issue a succession, and made them successors, within the plain definition of section 127. The argument for the plaintiff is, that the person creating the estate, or from whom it is derived, must die after the passing of the Act, to confer the succession defined. Such is not the language of the section. It suffices, if, by the death of any person dying after the passing of the Act, the devisee becomes beneficially entitled in possession to the estate. By the death of the mother, the children, who theretofore had an estate in expectancy, became beneficially entitled in possession. It seems equally clear, that, if the testator had died after the passage of the Act, the mother and children living, a tax as upon an estate in expectancy would have accrued against the children. In such case, under section 129, the tax would have been apportioned between the mother and children, and, if she had subsequently died, the Act being still in force, a new succession tax upon the value of her interest would have been payable by the children. The Act is carefully framed, and the most comprehensive terms are employed, to meet every case where a beneficial interest, either expectant or in possession, devolves upon a devisee. The language is so clear, and the conditions which constitute the definition of a "succession" and a "successor" are so plain and exact, that argument drawn from other sections of the Act is unavailing. The duty of one dollar *per centum* was due to the United States. The assessor properly added a penalty of fifty *per centum*, as a penalty for refusal to make return. Such penalty is imposed by the amendment made to section 118 by the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 479,) where the per-

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son who should make return wilfully neglects, or where such person refuses, to make return. A neglect to make return is not necessarily wilful; a refusal is, or, at any rate, is, by the statute, made equivalent to, a wilful neglect.

These conclusions are decisive against the plaintiff, and judgment is ordered for the defendant.

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MANASSAH BAILEY vs. THE TOWN OF LANSING.

## JOHN J. STEWART vs. THE SAME.

By a statute of New York, the county judge was authorized, on a petition by a specified number of tax-payers, to ascertain, by judicial inquiry, whether the majority of the tax-payers of a town, in number and in taxable property, desired the town to issue its bonds in aid of a railroad company, and, if he ascertained such to be the case, he was authorized to appoint three commissioners to execute and issue bonds in behalf of the town, and invest them in the stock or bonds of the company. On a petition and proofs, the county judge adjudged that the bonds should be issued by a town, and appointed commissioners to do so. Opposing tax-payers obtained a writ of *certiorari* for the review by the Supreme Court of the State of the decision of the county judge. After the writ had been issued, and the commissioners and the company had had notice of it, they executed the bonds and delivered them to the company. The Supreme Court reversed the judgment. The bonds had interest coupons, and B. subsequently brought suit against the town on some of the coupons. It did not appear how he acquired title to the coupons, or whether he ever owned the bonds to which the coupons belonged, although it appeared that he had the coupons in his possession before they fell due: *Held*, that he was not entitled to recover.

The issue of the *certiorari* suspended the operation of the judgment, and the company acquired no title to the bonds, which they could enforce as against the town.

It appearing that the bonds were issued in fraud of the rights of the town, the burden was upon B. to show that he was a purchaser of the coupons in good faith and for value.

But, certain of the bonds, with their coupons, having come into the hands of E.,

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as a holder of them for value, before maturity, and then having passed to S., it was *held*, that S. was entitled to recover in a suit on some of such coupons, against the town.

Various defences overruled, as against S., as a *bona fide* holder.

The reversal of the judgment of the county judge could not invalidate the title of a *bona fide* purchaser.

(Before WALLACE, J., Northern District of New York, June 20th, 1876.)

WALLACE, J. The suit by Bailey is brought upon interest coupons originally attached to bonds issued in aid of the Cayuga Lake Railroad Company, by commissioners appointed for that purpose by the county judge of Tompkins county, under the provisions of the bonding acts of 1869, 1870 and 1871, of the State of New York, (*Laws of 1869, p. 2303; Laws of 1870, p. 2049; Laws of 1871, p. 2115.*) These Acts authorize the county judge, upon the presentation of a petition by the requisite number of the tax-payers of the county, to ascertain, by judicial inquiry, if the majority of the tax-payers, in number and in taxable property, desire the town to issue its bonds in aid of the railroad, and, if he ascertains such to be the case, authorizes him to appoint three commissioners to execute and issue bonds in behalf of the town, and invest them in the stock or bonds of the railroad company. The county judge having entertained the petition of the tax-payers, and taken proofs, adjudged that the bonds should be issued, and appointed commissioners for the purpose. Opposing tax-payers contested the proceedings, and, pursuant to the statute, obtained a writ of *certiorari*, for the review of the decision of the county judge by the Supreme Court of the State. Upon review, the Supreme Court reversed the judgment. This reversal, in legal effect, vacated the entire proceedings taken before the county judge. The *certiorari* was the common law writ. After it was issued, and notice thereof given to the commissioners, and before the commissioners had taken the oath of office required by law, preliminarily to entering upon the duties of their trust, they executed and delivered the bonds to the railroad company, the latter having full notice of the

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*certiorari* and giving to the commissioners a bond of indemnity.

It does not appear how the plaintiff acquired title to the coupons in suit, but it does appear that they were in his possession before they fell due. It does not appear whether or not he ever owned the bonds to which the coupons were originally attached. Upon the facts, I do not think the plaintiff is entitled to recover. The bonds were originally negotiated between the commissioners and the railroad company in violation of good faith. The parties to the transaction were aware that proceedings were pending to annul the authority of the commissioners to issue the bonds. When the *certiorari* issued, the judgment and the proceedings upon which it was founded were removed to the Supreme Court, and the effect was, that all proceedings under the judgment, which had not actually been put in motion, would be suspended. The decisions in this State are uniform, that, upon the allowance of a *certiorari*, the effect of the judgment which it is taken to review, except in the single case of an execution already issued and in the process of being executed, is suspended as to all proceedings under it and as to all collateral matters. The judgment is not even evidence in a case between the same parties. It is as completely suspended as though it had never been rendered. (*Launitz v. Dixon*, 5 *Sandf.*, 249; *Conover v. Devlin*, 24 *Barb.*, 636.) Under these circumstances, the commissioners were no more justified in attempting to issue bonds in behalf of the town than they would have been if their agency had been revoked; and the railroad company, having knowledge of the facts, acquired no title to the bonds, which they could enforce as against the town. The case is not analogous to that where property has been sold under an execution upon a judgment subsequently reversed. I do not intend to intimate, that, if the bonds had been issued by the commissioners after the *certiorari*, and had come to the hands of an innocent purchaser, the latter would have acquired no title. Although the authority of the commissioners to act as agents of the town was suspended, such a purchaser would acquire the rights of a



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*bona fide* holder of commercial paper, and could recover against the principal as though the authority once conferred upon the agent had never been revoked. But, in such case, it would be incumbent upon the plaintiff to show that he had purchased innocently, relying upon the ostensible authority of the agent. (*Coddington v. Bay*, 20 *Johns.*, 637.)

These views lead to the conclusion, that, when it appeared that the bonds were issued in fraud of the rights of the defendant, the burden was cast upon the plaintiff to show that he was a purchaser in good faith and for value. He could not rest upon the presumption derived from his possession of the coupons before they became due. (*Rogers v. Morton*, 12 *Wend.*, 484; *Smith v. Sac County*, 11 *Wall.*, 139.)

Judgment is ordered for the defendant, in the suit by Bailey.

The suit by Stewart differs from the one by Bailey, in that it appears that the bonds were pledged as collateral, in February, 1873, to Elliott, Collins & Co., of Philadelphia, and sold by them after consultation with the officers of the railroad company. Elliott, Collins & Co. were holders for value and before maturity, and their sale to satisfy the pledge conveyed their title to the purchaser. Whether the plaintiff was the purchaser from them directly, or not, is not clear; but, however this may be, he succeeds to all the rights of Elliott, Collins & Co., and occupies the position of a *bona fide* purchaser.

As against a *bona fide* holder of the coupons, none of the defences interposed are tenable. Most of these defences are unavailing, within the doctrine of *Munson v. The Town of Lyons*, (12 *Blatchf. C. C. R.*, 539.) The petition upon which the county judge took cognizance of the proceedings for bonding the town was sufficient to call for the exercise of his judicial judgment; and, in an action on the bonds by a *bona fide* holder, this determination is conclusive.

It is urged, that there was no organized railroad company in behalf of which the town could extend its aid, because the articles of association fail to state the counties through which it is to run, as required by the General Railroad Act under

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which it is organized, and specify only the termini of the road. I am utterly unable to appreciate the argument. The road was actually organized, and if, in the manner of its organization, it failed to comply with such provisions of the statute, this could only be taken advantage of by the sovereign power; and after its corporate existence has been recognized by two subsequent Acts of the Legislature, it would, I think, be too late for the State to assail it.

It is also urged, that the bonds, when issued, were not sealed. I do not stop to inquire whether they were required to be sealed. It suffices that there is no sufficient evidence to show that they were not. The testimony of witnesses, that they do not remember to have seen seals on the bonds when they were delivered, in the absence of any pretence, even, that their attention was directed to the circumstance whether the seals were on, is entirely insufficient to authorize the conclusion that the offence of forgery has been committed by any one.

It is also urged, that the bonds contravene the statute under which they were issued, because not payable at the time required by it. The Act of 1871 does not repeal section four of the Act of 1869, but confers the right to issue bonds payable in less than thirty years, and, when thus issued, they are subject to the condition therein imposed. But, the right to issue pursuant to the terms of the first Act still exists, and the bonds in suit conform to the terms.

The reversal of the judgment of the county judge by the Supreme Court cannot invalidate the title of a *bona fide* purchaser. The bonds had been issued and put in circulation prior to the reversal. The judgment was effectual when they were put in circulation. After they were given currency, no decision of the Court could strip them of their negotiable character.

Judgment is ordered for Stewart.

*James R. Cox*, for the plaintiffs.

*Milo Goodrich*, for the defendant.

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## JAMES H. MURRAY vs. CHESTER A. ARTHUR.

Imported goods were seized by a collector of customs, as forfeited to the United States for undervaluation. Their appraised value exceeded by more than 10 *per cent.* their entered value, and they thereby became liable to 20 *per cent.* additional duty. They were proceeded against and taken into custody by the marshal, under process. Under proceedings for a remission of the forfeiture, the Secretary of the Treasury remitted it, on condition that the importer should pay the costs and the duties on the goods, if they were due, or give bond to export the goods. He elected to give bond, but the collector refused to permit the goods to be delivered until the importer had paid the 20 *per cent.* additional duty. He paid it and brought this suit to recover it back: *Held*, that the exaction was illegal, and that the plaintiff was entitled to recover.

Where a forfeiture is remitted by the Secretary of the Treasury, pursuant to the statute authorizing him to do so, the cause of forfeiture is released.

A fulfilment of the conditions imposed in a warrant remitting a forfeiture is equivalent to a satisfaction of the cause of action which constituted the ground of seizure.

(Before WALLACE, J., Southern District of New York, June 22d, 1876.)

WALLACE, J. The plaintiff imported certain merchandise into the port of New York, the value of which in the principal markets of the country from which it was imported was found by the appraiser to exceed by more than ten *per cent.* the invoice or entered value. Thereupon the merchandise was seized by the collector of customs, proceedings were instituted for its condemnation, and it was taken by the marshal into custody, under process. The plaintiff then presented a petition to the District Judge, praying a remission of the forfeiture, and, the same having been transmitted to the Secretary of the Treasury, the Secretary, after consideration, issued his warrant, remitting all the right and claim of the United States to the forfeiture, upon condition that the plaintiff pay the costs of the proceedings for forfeiture, &c., and the duties on the merchandise, if any were due, or give bond to export the merchandise without the limits of the United States. The

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plaintiff elected to give bond to export the merchandise; the defendant, as collector, refused to permit the delivery of the goods until the payment of the penal duty of twenty *per centum ad valorem*, which accrued by reason of the undervaluation. It is now insisted, for the defendant, that the merchandise, after the remission, was subject, as before the seizure, to the additional duty. In support of this position, it is urged, that the Secretary of the Treasury had no power to remit this duty, because it was not a fine, penalty, or forfeiture, and that he had no power to authorize the merchandise to be entered or exported for drawback, because it had been withdrawn from the custody of the officers of the customs, and was in the custody of the marshal, under the process of the Court.

The proceedings for the forfeiture of the plaintiff's merchandise were predicated upon the same grounds as those which subjected the merchandise to the additional duty. It is conceded by the counsel for the defendant, that, if these proceedings had been prosecuted to judgment and sale, no claim for the additional duty could thereafter have been maintained by the United States. This concession is fatal to the right to insist upon the additional duty, under the facts of this case; because, in my judgment, where the forfeiture is remitted pursuant to the statute authorizing the Secretary of the Treasury to do so, the cause of forfeiture is effectually released to the claimant. The statute which authorizes the remission proceeds upon the theory, that the property seized has become subject to forfeiture; and the power granted to the Secretary of the Treasury is given upon the assumption that the United States had acquired title to the property, which may be released to the claimant upon such conditions as the Secretary may see fit to impose. The claimant, by petitioning for a remission, concedes that his title has been divested, and appeals to the discretion of the Secretary. When he fulfils the conditions imposed by the latter, he is restored to his right of property and of possession, and is entitled to an order of the Court, if necessary, to carry the terms of remission into effect. The fulfilment of the conditions of the remission is

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equivalent to a satisfaction of the cause of action which constituted the ground of seizure. Unless this is the legal effect of the remission, the claimant received his property subject to another proceeding for forfeiture for the same cause—a conclusion too unreasonable to merit discussion. The power conferred on the Secretary of the Treasury to remit a forfeiture, necessarily includes the authority to discharge the cause of action. If he had seen fit, he could have required the payment of the additional duty as one of the conditions of the remission. If he had done so, and the condition had been fulfilled, it would not be claimed that the merchandise, nevertheless, remained still subject to the duty. If the merchandise would have been released by the imposition and fulfilment of such condition, it is by the fulfilment of any other condition imposed by the Secretary. The terms of the remission are confided to his discretion solely. Whether the additional duty be regarded as a penalty upon the importer, or as a duty not in the nature of a penalty, is not material. The power conferred upon the Secretary of the Treasury to release the cause of action upon such conditions as to him may seem meet, authorizes him to exact or to dispense with payment of penalty or duty. If he exacts it, the amount cannot be again exacted by the collector. If he dispenses with it, he has done so in the exercise of the discretion vested in him by the statute. Judgment is ordered for the plaintiff.

*Stephen G. Clarke*, for the plaintiff.

*George Bliss*, (*District Attorney*.) for the defendant.

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Gautier v. Arthur.

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## JAMES GAUTIER AND ANOTHER vs. CHESTER A. ARTHUR.

By section 18 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 216,) all goods, wares and merchandise of the growth or produce of countries east of the Cape of Good Hope, (except raw cotton,) when imported from places west of the Cape of Good Hope, were subjected to a discriminating "duty of ten *per centum ad valorem*, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." By section 5 of the Act of June 6th, 1872, (17 *Id.*, 233,) certain articles were declared to be "exempt from duty." The Act of 1872 did not have the effect to repeal the Act of 1864, so as to exempt from such discriminating duty articles falling within the description in the Act of 1864, although they were articles made exempt from duty by the Act of 1872.

(Before WALLACE, J., Southern District of New York, June 22d, 1876.)

WALLACE, J. The plaintiffs imported plumbago and citronella, the produce of a country east of the Cape of Good Hope, in a French vessel, from the British possessions west of the Cape of Good Hope. By section 18 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 216,) these products, thus imported, were subject to a discriminating "duty of ten *per centum ad valorem*, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." By section 5 of the Act of June 6th, 1872, (17 *Id.*, 233,) certain enumerated articles, among which are plumbago and citronella, were declared to be "exempt from duty." The plaintiffs' importation having been made after the last Act took effect, and the defendant, as collector of the port of New York, having exacted the discriminating duty of ten *per centum*, the plaintiffs bring this action to recover the sum thus exacted.

The case presents the question, whether the Act of 1872 repeals by implication, as to articles placed on the free list, the Act of 1864. A repeal by implication is not favored, and the earlier Act remains in force unless the later is manifestly repugnant to and inconsistent with it. Both Acts must stand if

both can be given effect as to the particular application involved. This may be done by exempting the articles placed on the free list, except when imported under the special circumstances which subject all importations to a discriminating duty.

Viewing the question as though the earlier and later Acts had been passed at the same time, and made separate sections of a comprehensive tariff code, would there be any reasonable doubt that articles not otherwise dutiable would be subject to the discriminating duty? It would seem evident that it was the legislative intent to lay a duty on all products of the growth of countries east of the Cape of Good Hope, without regard to the consideration whether or not such products were otherwise dutiable, because, it is imposed on such as are otherwise subject to a very low duty, as well as upon those subject to the highest duty. The discrimination regards solely the commerce which is the subject of the provision. Acts imposing discriminating duties are retaliatory measures, designed to countervail the unfriendly or illiberal policy of foreign powers towards our own commerce, and to coerce the removal of obnoxious restrictions which have been placed upon it, and to this end the interests of our own consumers are subordinated or ignored.

Upon the argument, it was urged that the discriminating duty is imposed only on articles otherwise dutiable, and does not apply where no other duty is imposed, and that the language used is so clear as to leave no room for deductions based upon general principles of construction, or predicated upon the general theory of such statutes. If the duty were one "in addition to the duties now imposed by law," there would be room for fair argument that it was intended to be applicable only to articles otherwise dutiable. But, such is not the language. The duty imposed is in addition to the duties imposed upon the products "when imported directly from the place or places of their growth or production." There are no duties imposed specifically on any products "when imported directly from the place of their growth or production;" and, if the

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argument is sound, it would result that no products are subject to the discriminating duty. There is nothing, therefore, in the language used, to indicate that any distinction between products dutiable and not dutiable was present in the minds of the law makers, when they imposed the discriminating duty. Judgment is ordered for the defendant.

*Abram Wakeman*, for the plaintiffs.

*George Bliss*, (*District Attorney*), for the defendant.

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JOSEPH P. COOPER vs. THE TOWN OF THOMPSON.

A statute validated the action of commissioners in issuing the bonds of a town in aid of a railroad company, and in exchanging them for the stock of the company, and declared that no bonds held by any person "in good faith or for a valuable consideration" should be void or voidable by reason of any defect or omission in the consents of the tax-payers, but that the bonds should be as valid as if such defect or omission had not occurred, provided that any exchange of the bonds for such stock was made at the par value of the bonds. Certain of the bonds had been exchanged for stock of the company at par value. Afterwards they were sold at a discount to A., who sold them to T. He owned them when the legalizing Act was passed, and subsequently detached certain coupons from them, and sold such coupons to C. In a suit by C., to recover the amount of such coupons, against the town: *Held*,

- (1.) The Legislature had power to validate the bonds;
- (2.) The fact that the bonds stated, upon their face, that they were issued in exchange for stock, while the original statute only authorized them to be negotiated for cash and at par value, did not affect the position of C., as a holder in good faith, of the coupons, he being a purchaser of them for value, nor was such position affected by the fact that C., when he bought the coupons, was aware that the town contested its liability upon the bonds;
- (3.) The legalizing Act validated all bonds that were originally exchanged at par value for the stock, unless the subsequent purchaser of them had notice of the illegality in their issue, and did not part with value on his purchase.



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The holder of a coupon payable to bearer is not an assignee of the cause of action, within the 1st section of the Act of March 8d, 1875, (18 U. S. Stat. at Large, 470.)

A coupon payable to bearer is a promissory note negotiable by the law merchant, within said 1st section.

(Before WALLACE, J., Southern District of New York, June 22d, 1876.)

WALLACE, J. Conceding, for the purposes of this case, that the bonds to which the coupons in suit were originally attached were issued in contravention of the statute (*Act of May 4th, 1868, Laws of New York, of 1868, p. 1128*) which authorized the town to lend its aid to the railroad, the defence is untenable, by force of the Act (*Act of April 28th, 1871, Laws of New York, of 1871, p. 1838*) legalizing the acts of the commissioners in issuing and disposing of the bonds. That Act validates the action of the commissioners in issuing the bonds, and in exchanging them for the stock of the railroad company, and declares that no bonds held by any person "in good faith, or for a valuable consideration, shall be void or voidable by reason of any defect or omission in the consents in writing of the tax-payers, \* \* \* but that the said bonds shall be as valid and effectual for every purpose, as if such defect or omission had not occurred, provided, that such or any exchange of bonds made by said commissioners for the stock of said company was made at the par value of the said bonds." It is in proof that the bonds were exchanged for stock of the railroad company at par value; that, very soon after they were issued, they were bought by the Atlantic Savings Bank for eighty-two and a half cents of their par value, with interest accrued; that the Savings Bank sold them shortly afterwards to Mr. Toucey, who owned them when the legalizing Act was passed, and that he subsequently detached the coupons in suit, and sold them to the plaintiff.

The power of the Legislature to validate such bonds is established by repeated adjudications, and is not contested here; but it is asserted that the plaintiff is not a holder in good faith, or for a valuable consideration, and is, therefore, not within

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the protection of the Act. It is insisted that he is not such a holder, because the bonds recite, upon their face, that they were issued in exchange for stock of the railroad company, while the statute only authorized them to be negotiated for cash, and at par value; and, also, because, when he purchased the coupons from Mr. Toucey he was aware that the town contested its liability upon the bonds. If Toucey could have maintained an action on the bonds before he sold the coupons to the plaintiff, it will not be controverted that the plaintiff has all his rights and can maintain this action on the coupons. If Toucey was not a *bona fide* holder of the bonds, because of the recital, clearly no purchaser could be, because the bonds themselves, which the Legislature proposed to validate, carried, on their face, notice of their invalidity, to all who purchased them. And if, because of this recital, there could not be a purchaser in good faith, the Act, so far as it attempts to validate the bonds, is inoperative and nugatory. It is to be assumed that the Act was passed with an understanding of all the facts that made the legislation necessary, and it follows, that a purchaser for value must be deemed a holder in good faith, within the meaning of the Act, when there is nothing to militate against his title, except what is presented by the bonds themselves. It is not shown that Toucey had notice of any defence to the bonds, when he purchased, except that contained in the recitals.

The Act also validates the bonds in the hands of a purchaser for a valuable consideration, as well as in those of a purchaser in good faith. The language used clearly protects, not only all purchasers who have not acquired title *mala fide*, but, also, all who have advanced a present, as distinguished from a precedent, consideration, upon the purchase of the bonds. Where a purchaser had notice of the illegality of the proceedings to bond the town, and did not part with value upon the purchase, the Act affords no aid; but, in all other cases, it imparts validity to all of the bonds that were originally exchanged at par value for the stock of the railroad company.

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For these reasons I reach an adverse conclusion to the defendant, upon this branch of the case.

It is insisted by the defendant, that, inasmuch as Toucey, from whom the plaintiff derived title to the coupons, could not have maintained an action himself in this Court, because not a non-resident of the State, the plaintiff cannot, under the first section of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) which provides that no Circuit Court shall "have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such Court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange." Prior to this provision, the prohibition, (*U. S. Rev. Stat.*, § 629,) was against cognizance "of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange;" and it was uniformly held, under that Act, that the holder of a promissory note, payable to bearer, was not an assignee, within the meaning of the statute, for the reason that a note payable to bearer is payable to any body who may become the holder, and the contract is with the holder, and the holder does not acquire title by an assignment, but by delivery. (*Bank of Kentucky v. Wister*, 2 *Peters*, 318; *Bullard v. Bell*, 1 *Mason*, 243; *Wood v. Dummer*, 3 *Mason*, 308; *Bradford v. Jenks*, 2 *McLean*, 130; *Bonnafée v. Williams*, 3 *How.*, 574; *Noell v. Mitchell*, 4 *Bissell*, 346.) Under these decisions, the holder of a coupon payable to bearer is not an assignee of the cause of action. He acquires title by delivery, and the promise to pay the bearer, in the coupon, is a promise to him directly. (*City of Lexington v. Butler*, 14 *Wall.*, 283.)

But, irrespective of this answer to the objection urged, the Act of 1875 excludes from its operation promissory notes negotiable by the law merchant. Coupons, when payable to bearer, are promissory notes negotiable by the law merchant, and possess all the attributes of promissory notes. A very re-

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cent case goes to the length of giving them days of grace. (*Evertson v. National Bank of Newport, New York Court of Appeals, April, 1876, 13 Albany Law Journal, 350.*) It may be necessary to resort to the bonds to which they were originally attached, to prove the execution of the coupons; but this does not deprive them of their negotiable character. Payment or cancellation of the bond will not defeat the rights of a prior holder of the coupons.

The motion for a new trial is denied, and judgment is ordered for plaintiff upon the verdict.

*Rastus S. Ransom*, for the plaintiff.

*Timothy F. Bush*, for the defendant.

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JOSEPH W. GODDARD AND OTHERS *vs.* CHESTER A. ARTHUR.

The invoice on which an entry of imported goods was made read thus:

" Merchandise, frs. ....	8670 25
Discount for cash, on gross am't, 2 p. c. ....	175 30
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frs. ....	8494 95

Terms cash; if not paid cash, interest to be added at the rate of 6 *per cent.*"

The collector refused to allow the 2 *per cent.* discount, and the goods were appraised at 8670.25 francs, and duty was exacted thereon. The net invoice price was the actual market value of the goods in the country of exportation: *Held*, that the duty on the 2 *per cent.* was improperly exacted.

The sale was, on the face of the invoice, a sale for cash at the lesser price, without credit, interest to be paid for delay.

(Before WALLACE, J., Southern District of New York, June 22d, 1876.)

WALLACE, J. The invoice upon which the plaintiffs entered an importation of merchandise was as follows:

" Merchandise, frs. ....	8670 25
Discount for cash, on gross am't, 2 p. c. ....	175 30
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frs. ....	8494 95

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Terms cash; if not paid cash, interest to be added at the rate of 6 *per cent.*” The collector refused to allow the two *per cent.* discount, and the merchandise was appraised as of the invoice price, at 8670.25 francs. This action is brought to recover the duty exacted on the two *per cent.* disallowed, and the only question is, whether or not the discount should have been allowed, in ascertaining the invoice price, it being conceded that the net invoice price was the actual market value of the goods in the country of exportation. As I construe the invoice, it evidences a sale for cash, at the price of 8494.95 francs. The purchaser has no term of credit, but the price is due on delivery, and, for any delay in making payment, the interest is stipulated at the rate of six *per cent.* The transaction is materially different from a sale on credit, where, by the terms, a discount is to be allowed, if cash is paid before the term of credit expires, and is, therefore, distinguishable from *Ballard v. Thomas*, (19 *How.*, 382.) In such case, the purchaser has an option to pay the regular price for the goods, or to satisfy the contract at a reduced sum, by performance at an earlier day than the contract day. In the present case, if the rights of the parties are to be controlled by the contract evidenced by the invoice, (and no other evidence was presented to the collector, or on the trial,) the purchaser has no option, and the vendor can in no event exact more than the net price and interest.

It is urged, that the appraisal is conclusive as to the value of the merchandise, and, even if erroneous, in the absence of fraud, authorized the collector to exact the amount which he required to be paid. But, the return of the appraisers shows that the market value of the merchandise was not a subject of inquiry. They attempt to return the invoice price, and the form of the return is such as to present simply the question for the consideration of the collector, whether the gross or the net price was the invoice price.

Judgment for plaintiff.

*William G. Choate*, for the plaintiff.

*George Bliss*, (*District Attorney*), for the defendant.

## MORGAN L. FILKINS AND ANOTHER

vs.

## NEWTON M. BLACKMAN. IN EQUITY.

B. invented a medicine which he called "Dr. J. Blackman's Genuine Healing Balsam," and made and sold it under that name. In 1865, B. conveyed to F. the exclusive right to use B.'s name in making and selling such medicine, for 10 years, for a sum to be paid every three months during that time, and, if F. performed his contract for the full 10 years, then B. granted to F. "all of the rights and privileges" to use B.'s name in making and selling such medicine, without fee or reward to B., for 50 years: *Held*, that F. acquired, after the 10 years, the same exclusive right which he had during the 10 years, and that his right for the 50 years was exclusive as against B. and subsequent grantees of B.

The name of such medicine is a valid trade-mark; and the exclusive right to use such trade-mark will pass, by assignment, to any one who has lawfully obtained from the inventor of the medicine the exclusive right, also, to make and sell, and who does sell, the medicine compounded according to the original formula.

When a partnership is formed to make an article to which a given trade-mark is properly applied, such trade-mark, if belonging to one partner, becomes, in the absence of special regulations, part of the partnership property.

A preliminary injunction granted to restrain the use of such trade-mark.

(Before SHIPMAN, J., Connecticut, June 30th, 1876.)

SHIPMAN, J. In the bill in equity which was originally filed by the plaintiffs, they averred that they were residents of the city of Albany, and citizens of the State of New York, and were, as copartners, manufacturers and dealers in proprietary medicines; that they had long manufactured and sold a well known article of medicine, called "Dr. J. Blackman's Genuine Healing Balsam," which had gone into extensive use, and obtained a high reputation; that they had acquired an exclusive right to the use of that name as a trade-mark, and had also a right to the use of certain labels, which

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had been devised by one of the plaintiffs, upon the bottles containing the medicine; and that the defendant, a resident and citizen of Danbury, in Connecticut, was using, upon bottles of medicine of his own manufacture, said trade-mark, and labels which were close imitations of the plaintiffs' labels. The bill prayed for an injunction. Upon the hearing of a motion for preliminary injunction, the plaintiffs asked and obtained leave to amend their bill, by the averment, that, on October 14th, 1875, they deposited in the Patent Office, for registration, a label, of which the following is the title, viz., "Dr. J. Blackman's Genuine Healing Balsam," the right to the use of which they claimed as sole proprietors, and that said trade-mark was then duly registered in the Patent Office, and a certificate thereof was duly issued to the plaintiffs. The motion was tried upon the affidavits which were presented by the parties, no answer having been filed at the time of said hearing. The affidavits of the defendant deny the right of the plaintiffs to any exclusive use of such name or title, and assert the right of the defendant to manufacture said medicine, and to use said name, and assert that the plaintiffs do not manufacture the medicine according to the original formula, and have abandoned the use of the name "J. Blackman" in their trade-mark.

From the affidavits which are on file, it appears that Jonas Blackman is the father-in-law of Morgan L. Filkins, one of the plaintiffs, and was, about the year 1840, the inventor of the article which was called, at the time of the discovery, "Dr. J. Blackman's Genuine Healing Balsam." It was at first sold under said name from house to house, until Dr. Filkins made a contract with Dr. Blackman, by which the former obtained a right to manufacture, or assist in the manufacture and sale of, said medicine. He subsequently entered into the business somewhat extensively, and placed the medicine upon the market. Two or three contracts were made between these parties, which expired by lapse of time or by mutual agreement. The final contract was as follows: "This agreement made and entered into this 28th day of November,

A. D. 1865, between Jonas Blackman, of the town of Brookfield, and county of Fairfield, State of Connecticut, of the first part, and Morgan L. Filkins, of the city and county of Albany, and State of New York, of the second part, witnesseth, that, in consideration of the covenants and agreements hereinafter contained, to be performed by the party of the second part, the said party of the first part hereby sells and conveys unto the said party of the second part, his heirs or assigns, the exclusive right to use his name in the manufacture, putting up and sale of certain medicines, known as Dr. J. Blackman's Genuine Healing Balsam, Dr. J. Blackman's Valuable Red Salve, and Dr. J. Blackman's Valuable Strengthening Plasters, for the term of ten years from the first day of January, A. D. 1866; and the party of the first part hereby agrees not to manufacture, or cause to be manufactured, either himself or by his agents, or authorize any other person or persons to use his name in the manufacture of, said medicines, or any other medicine recommended to cure diseases said medicines are said to cure; and the party of the second part agrees, in consideration of the covenants and agreements hereinbefore stated, to pay unto the party of the first part, or his assigns, the sum of \$365 annually, lawful money, at Brookfield, in the State of Connecticut, in manner following, to wit, \$91 25 on the first day of each of the following months of April, July, October and January, of each year, up to and including the 1st day of January, A. D. 1876; and it is further agreed by the party of the first part, provided always that the party of the second part does well and truly perform the covenants and agreements to be by him kept and performed for the full term of ten years from the 1st day of January, A. D. 1866, thereafter the party of the first part gives and grants to the party of the second part all of the rights and privileges to use his name in the manufacture, putting up and sale of said medicines, without fee or reward to the party of the first part, his heirs or assigns, for the full term of fifty years or more; and it is mutually agreed by and between the parties to these presents, that, in



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case either party shall fail to perform the covenants and agreements by such party to be kept and performed, the party so failing to perform shall pay unto the other party the sum of fifty thousand dollars, which sum of fifty thousand dollars the parties hereto have agreed to fix and liquidate as the damages in case of non-performance."

The medicine has become well known, mainly through the efforts of Dr. Filkins to introduce it to the public, has quite a large sale among druggists, and has been a source of profit. It is now made by the plaintiffs substantially according to the original formula which was furnished by Dr. Blackman, and the plaintiffs have never abandoned the use of the original name. The name of the inventor, "J. Blackman," is the distinctive part of the name or title of the medicine, and gives to the title its peculiar value. Newton M. Blackman, who is the son of Jonas Blackman, has engaged in the manufacture of the same medicine, which is put up in bottles encircled with labels closely resembling those which are used by the plaintiffs, and containing the same title or name—"Dr. J. Blackman's Genuine Healing Balsam." The defendant states, in his affidavit, that his father has sold him the formula, and the right to manufacture the medicine, and to use the father's name.

The question in the case is, whether or not the plaintiffs now have a clear and exclusive continuing right, under the contract which was entered into between Jonas Blackman and Morgan L. Filkins, to the use of the name which was originally given to the medicine by the inventor, and whether or not, therefore, the plaintiffs held the right, at the time of the registration of the trade-mark, to its exclusive use after January 1st, 1876.

The following general principles in regard to the assignment of the exclusive use of trade-marks are applicable to this case. The name "Dr. J. Blackman's Genuine Healing Balsam," which was originally given to the medicine by the inventor, "points out distinctly the origin or ownership of the article to which it is affixed," and the words "were

appropriated as designating the true origin or ownership of the article or fabric to which they are attached." (*Canal Co. v. Clark*, 13 Wall., 311.) The name, as a whole, was his trade-mark, which he had the exclusive right to use, and the exclusive use of which would pass, by assignment, to any one who had lawfully obtained from the inventor the exclusive right, also, to manufacture and sell, and who did sell, that particular article compounded according to the original formula. "The property or right to a trade-mark may pass, by an assignment, or by operation of law, to any one who takes, at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and, so, cannot pass by an assignment, or descend to a man's legal representatives." (*Dixon Crucible Co. v. Guggenheim, Am. Trade-mark Cases*, 559.) If the assignee should make a different article, he would not derive, by purchase from Jonas Blackman, a right which a Court of equity would enforce, to use the name which the inventor had given to his own article, because such a use of the name would deceive the public. The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached. It is not, however, necessary that an article to which a trade-mark, personal in its inception, was originally affixed, should always be manufactured at the same place where it was originally made. This particular trade-mark, being the name of the inventor, was personal to Dr. Blackman, in its inception, but has been permitted by him to be applied, and to be appropriated, to the same article when manufactured by Filkins Bros. Under the circumstances in which the medicine has been manufactured and sold, the use of the trade-mark does not imply that the medicine was manufactured by Jonas Blackman, but that it is the same article which he originally invented and manufactured. (*Bury v. Bedford*, 10 Jurist,

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Filkins v. Blackman.

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*N. S.*, part 1, 503; *Leather Cloth Co. v. American Cloth Co.*, 11 *Jurist, N. S.*, part 1, 513.) It is also to be noticed, that an assignee of a trade-mark does not obtain a right to restrain copyists of his mark, merely by virtue of his assignment, but he must also show that it has actually been used and applied upon an article, so that the public have come to understand that "the article to which it is attached is the manufacture or production which is generally known in market under that denomination." (*Walton v. Crowley*, 3 *Blatchf., C. C. R.*, 440.)

In this case, an agreement was made on November 28th, 1865, between Jonas Blackman and Morgan L. Filkins, by which, in consideration of the agreement of the latter to pay specified royalties, Blackman sold and conveyed to Filkins, his heirs or assigns, the exclusive right to use the name of the inventor, in the manufacture and sale of certain medicines, for the term of ten years from January 1st, 1866. Blackman further agreed not to manufacture, or cause to be manufactured, and not to authorize any person to use his name in the manufacture of, said medicines; and, in case the said Filkins performed his covenants for the term of ten years, Blackman further granted "all of the rights and privileges to use his name in the manufacture, putting up and sale of said medicines, without fee or reward, for the term of fifty years or more." There is no question that an exclusive right was granted for the ten years ending January 1st, 1876; but it is claimed that thereafter a bare right or privilege was granted, in common with Jonas Blackman, to use his name and to manufacture said medicines. The determination of this question depends upon the construction which shall be given to the grant of "all of the rights and privileges to use my name." An exclusive right had been given for ten years, upon the payment of royalty, and, thereafter, "all of the rights and privileges" to use the name of the grantor were given, without royalty, for the term of fifty years. The terms "an exclusive privilege," and "all of the rights and privileges," as used in this contract, are synonymous, and, by the words "all of the

rights and privileges" are meant all the rights, or the entire right, which the grantor had at the expiration of the term of ten years. Each word in the phrase "all of the rights" is to have the force which naturally belongs to such word, and, by construing the words to mean a conveyance of a bare right, the same effect is given to the language as if it had been "I convey the right, or a right, to use my name," which construction leaves the word "all" without any significance. If the grantor retained the right in common with Filkins to use the name of the inventor, he did not convey all of his rights, but retained as much as he granted. The grantor intended to convey, in a certain contingency, all the rights, for fifty years, which he had previously conveyed for the term of ten years. If the same language which is used in this entire contract had been used in an assignment of a patent or of a copyright, although it is true that "property in a trade-mark, or in the use of a trade-mark, has very little analogy to that which exists in copyrights or in patents for inventions," (*Canal Co. v. Clark*, 13 Wall., 311), the assignment would, it is believed, convey the exclusive right for the specified term. The grant is unlike a grant of an easement, for, there, the title to the land is retained, and in this case, the grantor parts with his entire right to the thing which is the subject-matter of the conveyance—the use of the trade-mark. I am of opinion that Filkins obtained, by the contract, an exclusive right to use this name, in the manufacture of the medicine, for the term of fifty years from January 1st, 1876.

The contract was made by Blackman with Morgan L. Filkins alone, and it is suggested, that, inasmuch as the bill is brought by Filkins Brothers, and as Welcome L. Filkins was not a party to the contract, or to the grant, the firm has no legal right to the use of the mark. When a partnership is formed in regard to the manufacture of the article to which the trade-mark is properly applied, "the trade-mark of one partner, in the absence of special regulations, becomes part of the partnership property." (*Bury v. Bedford*, 10 Jurist, N. S., part 1, 503.)

In regard to the propriety of granting a preliminary injunction, it is obvious that the plaintiffs have expended a good deal of money in advertising and in bringing this medicine into public use. They have made its manufacture profitable, and have invested their property in the business. The defendant has but recently, and not extensively, engaged in the manufacture, but is seeking to take advantage of the reputation which the efforts of others have given to the article. The contest between the parties is plainly the result of a family quarrel, in which, I think, the defendant is seeking to obtain a position to which the previous contract and business relations between his father and brother-in-law have given him no right.

Let a preliminary injunction issue, restraining the defendant from the use of the trade-mark "Dr. J. Blackman's Genuine Healing Balsam," and from the use of any label containing that name, or the name of Dr. J. Blackman.

*Chase, Bestow & Holt*, for the plaintiffs.

*Henry T. Blake* and *E. D. Strong*, for the defendant.

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THOMAS A. WESTON vs. WILLIAM H. WHITE AND OTHERS.

The validity of the letters patent granted to Thomas A. Weston, August 6th, 1867, for differential pulley blocks, seems to be generally conceded in the United States, although no adjudication has ever been had in our own Courts. Where no question is made as to infringement or priority, or as to the novelty or patentability of the invention, and where the public generally have acquiesced in the claim of the patentee to a monopoly, an adjudication by a Court of law or equity is not required before a preliminary injunction will be granted.

In December, 1859, W. filed a caveat, which, by renewal, was in force until December, 1861. In January, 1861, D. obtained a patent for the same invention, W. not having been notified of D.'s application. In December, 1861, W. applied for a patent, which was rejected because of D.'s patent. In July, 1862, W., who had been in England since 1858, first heard of such rejection. In July, 1863, his attorneys, who were also D.'s attorneys, obtained a declaration of interference, but gave no notice of it to W., and the matter was decided in favor of D., by default, but W. was not notified of the result. In July, 1865, such attorneys applied for a second interference, which was declared in November, 1865. In July, 1866, W. returned from abroad, and employed other counsel, but no testimony was taken on the part of W., and the matter was decided in favor of D., by default. In October, 1866, W. withdrew his application of December, 1861, with the intention and for the purpose of filing a new application, which was done in December, 1866. In January, 1867, a new interference was declared, which, in June, 1867, was decided in favor of W. When the first two interferences were applied for W. was detained in England by a writ of *ne exeat*, and was not aware that his attorneys were D.'s attorneys. Articles containing the patented invention were made and sold by others than W. in 1863, 1864 and 1865: *Held*, that the application of 1866 was intentionally in continuation of the prior application; that W. had not been guilty of laches; that he had not abandoned his application or his invention; and that such public use of the invention did not avoid the patent.

(Before SHIPMAN, J., Connecticut, July 8th, 1876.)

SHIPMAN, J. This is a motion for a preliminary injunction to restrain the defendants from an infringement of letters patent granted to Thomas A. Weston, on August 6th, 1867, for differential pulley blocks. English letters patent bearing date April 25th, 1859, and published October 22d, 1859, had been issued to Mr. Weston, for the same invention. It has been decided by this Court, (*ante*, p. 364,) that the American patent will expire on October 22d, 1876. The defendants do not deny infringement, and do not substantially deny the patentability of the invention, or that Weston was the first and original inventor. The validity of the patent seems now to be generally conceded in this country, although no adjudication has ever been had in our own Courts. In the case of *Tangye, assignee of Weston v. Stott*, which was tried before Sir W. P. Wood, Vice Chancellor, and a special jury, in December, 1865, the priority of Weston's claim to

originality, and the validity of the English patent, were sustained by the verdict. Where no question is made as to infringement or priority, or as to the novelty or patentability of the invention, and where the public generally have acquiesced in the claim of the patentee to a monopoly, an adjudication by a Court of law or of equity is not required before a preliminary injunction will be granted.

The objection to the validity of the patent is upon the ground that, prior to the application upon which the patent was issued, and which application was dated October 3d, 1866, the patented article had been in public or common use in this country. The history of the invention, and of the various applications by Weston for a patent, and of the use of the invention in this country, is as follows: Weston, on December 31st, 1859, filed in the patent office a caveat for this invention, which was renewed, and was in force until December 31st, 1861. On December 6th, 1860, J. J. Doyle filed his application for a patent for substantially the same invention, and a patent was issued to him on January 8th, 1861. The Commissioner of Patents did not give Weston the notice required by the 12th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 121,) of the existence of Doyle's application. The Examiner of the Patent Office, in his decision of June 8th, 1867, upon an interference between Doyle and Weston, says: "Notwithstanding the fact that Weston had a caveat properly filed and in full force, Doyle files an application and obtains his patent for the pulley which is fully described in said caveat, without the slightest reference being had to the latter. The fact cannot be denied, that Doyle's patent, under the circumstances, no notice having been taken of Weston's caveat, was improperly issued, and that an act of great injustice, unintentionally, of course, was perpetrated towards Weston." On December 14th, 1861, Weston made an application for a patent for the invention described in his caveat, which application was refused on December 18th, 1861, on account of the existence of Doyle's patent. In July, 1862, Weston, who had been in

England since the year 1858, first heard of the rejection of his application. In March, 1863, he took measures, through his attorneys in New York, who had renewed his caveat, and who were also Doyle's attorneys, to obtain a patent. The attorneys, on July 14th, 1863, asked the Patent Office to declare an interference, which was declared July 16th, 1863, and the first Monday of September, 1863, was appointed for the hearing. No notice was given to Weston of this interference, and nothing was done by the attorneys prior to the day of the hearing, on which day judgment went, by default, in favor of Doyle, but no notice of this result was communicated to Weston, who was still in England, and whose presence there was demanded. Early in 1865, Weston communicated with his attorneys, who, on July 12th, 1865, asked of the Patent Office the declaration of a second interference, which was declared on November 20th, 1865, and the hearing was appointed for the first Monday of May, 1866. No steps were taken on behalf of Weston by his attorneys, who were still attorneys also for Doyle, to prepare for this hearing. In July, 1866, Weston returned to this country, and employed other counsel, who asked for a postponement of the hearing, on August 28th, 1866, which request could not be granted. He was obliged to let the case go by default, and, on October 17th, 1866, judgment *pro forma* was given in favor of Doyle, in the absence of testimony on the part of Weston. On December 1st, 1866, Weston made another application for a patent, and, on January 1st, 1867, a new interference was declared, and a decision was rendered June 10th, 1867, in favor of Weston. At the time of making the first two applications for interference, Weston was detained in England by a writ of *ne exeat*, issued in proceedings growing out of the suit in favor of Tangye, and was unaware that his attorneys were also the attorneys of Doyle, and they, as might be expected, neglected the business of one of their clients. The laches of the attorneys should not be visited upon Weston, by reason of the fact that their conduct was, at least, constructively fraudulent. Neither was he, by reason



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Weston v. White.

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of his compulsory detention in England, and his ignorance that his interests in this country were in jeopardy, guilty of laches in the prosecution of his application. The application for a patent was withdrawn about October 17th, 1866, for the purpose of filing a new petition, and with that intention at the time of the withdrawal. The new application was for the same invention as the one which was claimed in his original application and caveat. This invention and the original application have never been abandoned by Weston.

In 1863, Samuel Hall's Son & Co., a firm in the city of New York, made and sold differential pulleys, which were exact imitations of the patented invention, although they were stamped as if made under Doyle's patent. The Doyle pulley was not successful. In 1864, the firm removed to Newark, and engaged in the business upon quite a large scale. James Bird, of New York, also made the same pulleys in 1865. The defendants base their objection to the validity of the patent upon the ground that the manufacture and sale of the Weston pulleys, in 1863, 1864 and 1865, constituted a public or common use of the patented article, prior to the application of Weston for his patent in 1866, and that, therefore, the patent is invalid, under the 6th and 7th sections of the Act of March 3d, 1839, (5 *U. S. Stat. at Large*, 354.)

There is no doubt that the Weston pulleys were in public or common use in this country as early as the year 1863, and, if no application had been made by Weston prior to December, 1866, or if the prior application which he did make had been abandoned, it is true that the patent would be invalid. But, it is found that an application was made in 1861, which was improperly rejected, and which was not withdrawn until October, 1866, when it was withdrawn for the purpose of filing a new application for the same invention which was originally claimed, and that the application of 1866 was intentionally in continuation of the previous application for substantially the same invention, and that no laches or fault is attributable to Weston for this apparent delay after the first rejection of his application, and that he had neither

abandoned his application nor his invention. "If an applicant for a patent choose to withdraw his application for a patent, intending, at the time of such withdrawal, to file a new petition, and he accordingly does so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application, within the meaning of the law." (*Godfrey v. Eames*, 1 Wall., 317.) This statement of the law presupposes that the original application is an existing, and not an abandoned, application. For, it is believed that the Supreme Court "did not intend to decide that every subsequent application for a patent should be deemed, in judgment of law, to relate back to the first, whatever the interval of time, or the intervening acts of the applicant between them," although the applicant might have wished or intended that such result should take place, when he filed his new application. (*Bevin v. East Hampton Bell Co.*, 9 Blatchf. C. C. R., 50.) The continuity of the two applications is a question of fact, to be determined, in each case, upon an examination of its own circumstances. In order to ascertain this fact, the trier will find whether the inventor has abandoned his original application, either by his own will, or by his acts, and whether the new application is substantially for the same invention which was originally claimed. If the two applications are found to be continuous, and it has been therefore proved that the delay in making the new application, after the rejection of the first, has not been unreasonable, under the circumstances of the case, and if the invention has not been abandoned to the public, the public use, in order to invalidate the patent, must be a use prior to the original and continuing application. Public or common use subsequent to the date of the original application, if that has been a continuing one, and the two petitions are "parts of the same transaction," will not avoid the patent. (*Godfrey v. Eames*, 1 Wall., 317; *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff., 555; *Adams v. Jones*, 1 Fisher's P. C., 527; *Howe v. Newton*, 2 Id., 531; *Blandy v. Griffith*, 3 Id., 609; *Smith O'Connor*, 6 Id., 469; *Singer v. Braunsdorf*, 7 Blatchf. C.

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The Asbestos Felting Co. v. The U. S. and Foreign Salamander Felting Co.

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*C. R.*, 527; *Bevin v. East Hampton Bell Co.*, 9 *Blatchf. C. R.*, 50.) In this case, it is not claimed that there was any common or public use in this country, of this invention, prior to the original application.

The invention of Weston has been of great utility and has gone into extensive use. The defendants have recently engaged in the manufacture of pulleys, and were early warned of the consequences of infringement. There seems to be no equitable reason why a preliminary injunction should be refused. The motion for a preliminary injunction should be granted.

*Edmund Wetmore*, for the plaintiff.

*George E. Terry* and *Stephen W. Kellogg*, for the defendants.

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### THE ASBESTOS FELTING COMPANY

vs.

### THE UNITED STATES AND FOREIGN SALAMANDER FELTING COMPANY. IN EQUITY.

A junior patent was issued after an interference had been declared by the Patent Office between the application for it and a senior patent, and a decision in favor of the subsequent applicant. The owner of the senior patent then filed a bill against the owner of the junior patent, alleging the conflict of the patents, and that the invention covered by the senior patent was prior in time, and that the defendant had brought suits for the infringement of his patent, and praying that the junior patent might be cancelled, and that, *pendente lite*, such suits on it might be enjoined. A preliminary injunction to that effect being applied for: *Held*, that it could not be granted.

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The Asbestos Felting Co. v. The U. S. and Foreign Salamander Felting Co.

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The fact of the decision on the interference is sufficient ground for refusing the application.

The defendant ought not to be restrained from bringing suits on his patent, before that patent is adjudged to be invalid.

(Before BLATCHFORD, J., Southern District of New York, July 11th, 1876.)

BLATCHFORD, J. The plaintiffs, owners of a senior patent, allege, in their bill, that the defendants are owners of a junior patent, which was issued after an interference had been declared, and testimony had been taken, and the Patent Office had decided in favor of the subsequent applicant. The bill further alleges that the patents are in conflict; that the later patent was obtained through fraud, but in what manner is not set forth; and that the defendants have brought suits in Massachusetts for the infringement of their patent. It also alleges the priority in time of the invention covered by the senior patent, and prays that the junior patent may be cancelled, and that, until an adjudication in this suit, the defendants may be enjoined from bringing suits for the infringement of the junior patent. An application is now made for such injunction.

It ought, probably, to be a sufficient reason for denying this application, that the defendants' patent was granted after a full hearing before the Patent Office, on testimony taken in an interference declared between the application for such patent and the plaintiffs' patent. But, in addition to this, I have examined such testimony, and it shows plainly that the defendants' patent was properly granted, and that, as between it and the plaintiffs' patent, the latter cannot prevail.

Independently of the foregoing considerations, I am not aware of any principle which would authorize the Court, in a suit of this character, to restrain a defendant from bringing suits on his patent, before that patent is adjudged to be invalid. The granting of the patent to the defendants confers the right to bring suits thereon for its infringement. Especially is this so as between the parties to this suit, in view of the interference and its result. There is no evidence

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to sustain the charge of fraud, even if the plaintiffs could be heard to make it.

The application for an injunction is denied.

*Jonathan Marshall*, for the plaintiffs.

*George E. Betton*, for the defendants.

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THE OXFORD IRON COMPANY

vs.

EDWIN P. SLAFTER, ASSIGNEE IN BANKRUPTCY OF FOOT,  
DODD & Co.

Under the provisions of section 12 of the Act of June 22d, 1874, (18 *U. S. Stat. at Large*, 180,) amendatory of section 39 of the bankruptcy Act of March 2d, 1867, (14 *Id.*, 536,) it is not necessary to the invalidity of an act alleged to be preferential in its character, which took place prior to December, 1873, that it should come up to the test imposed by such section 12, but such act is to be tried according to the law of 1867.

Where a new rule is sought to be applied to past acts, the expression of the legislative purpose ought to be clear and distinct.

When an amendatory law contains express provisions fixing the period of its retroaction in certain specified cases, such specification almost necessarily leads to the conclusion that, in all other and unspecified cases, the amendment is not to have a retroactive effect.

The testimony of the parties to a transaction questioned as preferential under the bankruptcy Act, as to their intentions, though competent, is inherently weak, and can rarely avail against the stronger proof which the transaction itself affords.

(Before JOHNSON, J., Northern District of New York, July 12th, 1876.)

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The Oxford Iron Company v. Slafter.

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JOHNSON, J. This cause was tried before me, without a jury. That the original debt was an honest debt is not disputed, and is, besides, entirely plain, upon the proof. The assignee resists the claim of the plaintiffs upon the alleged ground that the transfer by Foot, Doud & Co. to the plaintiffs, on the 29th of December, 1871, of a quantity of nails, was preferential in its character, in violation of the provisions of the bankrupt Act, and that, consequently, the plaintiffs' debt became incapable of proof.

That the validity and consequences of acts done should be determined according to the law in force at the time when they were done, is so consonant to natural justice, that, even when it is competent for the legislative power to assert a different rule, Courts will look carefully to see that the expression of the legislative purpose is clear and distinct, that a new rule shall be applied to past acts. When existing laws are amended by enactments that such a section shall read in an altered manner, and the altered section contains in part the old law, and in part new provisions, the latter will be construed to relate to subsequent acts, and the former will be considered as having been the law from the time of its first enactment; and, when there is no express repeal of the law as it stood at the time of the amendment, that law will, in the absence of express provisions to the contrary, be deemed to apply to, and to govern, the validity and consequences of acts done before it was amended. (*Ely v. Holton*, 15 N. Y., 595.) More especially must this rule be adhered to when the amendatory law contains express provisions fixing the period of its retroaction in certain specified cases; for, this specification almost necessarily leads to the conclusion that, in all other and unspecified cases, the amendment is not to have a retroactive effect. (*Tinker v. Van Dyke*, 8 *Chicago Legal News*, 235, U. S. Circuit Court, Eastern District of Michigan, *Emmons, Cir. J.*)

On the 30th of January, 1872, the petition was filed for an adjudication against Foot, Doud & Co., as bankrupts, and, on the 7th of February, 1872, they were duly adjudicated

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bankrupts. The Act of June 22d, 1874, (18 *U. S. Stat. at Large*, 180,) amendatory of the bankrupt law, by its section 12, amended section 39 of the bankrupt Act of March 2d, 1867, (14 *Id.*, 536,) so as to read as set out in section 12. Its retroaction is limited to the first day of December, 1873, when it is prescribed that it shall have any retroactive operation, and this provision excludes, in my view, any other period for retroaction. It is not necessary, therefore, to the invalidity of an act alleged to be preferential in its character, which took place prior to December, 1873, that it should come up to the test imposed by the amendatory Act of 1874. It is to be tried according to the law of 1867, as embodied in the Revised Statutes. Under that law, if the creditor receiving the preferential payment or conveyance had reasonable cause to believe that a fraud on the Act was intended, and that the debtor was insolvent, he cannot be allowed to prove his debt in bankruptcy.

Upon a careful examination of the evidence in the case, I do not find that the presumption of fraud arising from the transaction in question being out of the usual course of business, under section 5130 of the Revised Statutes, is overcome. On the contrary, judging from the correspondence of the parties, to which I attach more weight than to the oral testimony, I think the case of the defendant is made out. That both the bankrupts and the creditors intended a preference seems to me established. That the debtors were insolvent, and that the creditors had reasonable cause to believe them to be insolvent, seems to me made out with great cogency of proof. The surrounding circumstances point too strongly to this conclusion to be overthrown by the testimony of the parties to their intentions. Such testimony, though competent, is inherently weak, and can rarely avail against the stronger proof which the transaction itself affords. There must be judgment for the defendant.

*Edward C. Delavan*, for the plaintiffs.

*Dennison & Everett*, for the defendant.

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Smith v. Reynolds.

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J. LEE SMITH &amp; Co.

vs.

ROBERT REYNOLDS AND SAMUEL JACOBS. IN EQUITY.

The registration of a trade-mark for "paints" by A., who had previously acquired the exclusive use of such trade-mark for particular kinds of paints only, does not enable A. to restrain B. from using such trade-mark upon another kind of paint, to which B. had been in the habit of affixing such trade-mark prior to such registration.

(Before SHIPMAN, J., Southern District of New York, July 19th, 1876.)

SHIPMAN, J. This is a bill in equity to restrain the defendants from the use of a trade-mark for "paints," which was registered in the Patent Office on February 21st, 1871. After full proofs had been taken for final hearing, a motion for a preliminary injunction was heard before Judge Blatchford, whose opinion (*Smith v. Reynolds*, 10 *Blatchf. C. C. R.*, 100) recites the allegations of the bill and answer, and the facts which he found to have been proved. No question has been made before me as to the correctness of the decision of the learned judge upon the points of law which are considered in his opinion. The controversy has turned upon the questions of fact. While I concur with Judge Blatchford in the result which he reached, I deem it desirable to state somewhat more in detail than he did, some of the facts which seem to me to be important.

The plaintiffs, who have been for many years importers of paints, in September, 1869, opened negotiations with a new firm of English manufacturers, for the purpose of introducing their goods into the market in this country. Recognizing the importance of having a trade-mark by which these goods should be known, and under which they should attain a reputation, the plaintiffs adopted the crown as such mark,



and instructed the English firm to place that mark upon all goods of their manufacture which were sent to the plaintiffs. This was done, and the crown brand soon became well known and was largely sold. It was applied on "Paris white, Venetian red, drop black, Indian reds, Tuscan reds, patent drier, oak stain, dry ochres, ochres in oil," and various other colors. It does not appear to have been applied to white lead or *blanc de zinc*. The white lead which the plaintiffs sold was the manufacture of other English firms, whose goods had their own peculiar and well known trade-mark. No white lead of English manufacture, having a "crown" trade-mark, has been known in the markets of this country. A number of years ago, another firm in the city of New York imported *blanc de zinc* which was branded with the English coat of arms. Their business was transferred to a corporation in Boston, which continues the sale of this article under the same brand.

At the time of the registration of the "crown" trade-mark, the plaintiffs had acquired, at common law, a right to the use of this mark upon the particular class of paints to which it had been applied, but had not used the mark upon all paints which they sold, and especially had not adopted its use upon white lead or zinc. On December 30th, 1870, they filed a petition in the Patent Office, representing that they were using, and had the right to use, a trade-mark for "paints," which trade-mark consisted of the illustration of a crown. On February 21st, 1871, the Patent Office issued a certificate, to the effect that said trade-mark had been duly registered and recorded, and would remain in force for thirty years from that date. Since said date, it does not appear that the plaintiffs have used this trade-mark upon white lead or zinc, but they have continued to use it upon the same kinds of paint which have been mentioned, and the public has understood that the mark belonged to this particular manufacture, and distinguished it from like goods of other manufacturers or vendors. In February, 1870, the firm of Reynolds & Co., which consisted of Robert Reynolds and Jacob Israel, who were manu-

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Smith v. Reynolds.

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facturers of paints, commenced to use a label and brand upon the white lead which they manufactured. This label consisted of an inner circle, within which, at the top, was the illustration of a crown, and underneath that the letters "X X," and underneath these letters the words "Reynolds & Co.," and outside of such circle a second circle, and in the ring between the two circles the words, circumferentially, "Pure English White Lead." The copartnership of Reynolds & Co. expired January 1st, 1872, and the defendants, under the firm of Reynolds & Jacobs, have continued to use the same brand upon their white lead ground in oil, and also upon packages of *blanc de zinc* ground in oil.

The question which arises upon this state of facts is—does the registration of a trade-mark for "paints," by a plaintiff who had previously acquired the exclusive use of such mark for particular kinds of paints only, enable the plaintiff to restrain a defendant from its use upon another kind of paints, to which kind he had been in the habit of affixing the same mark prior to the registration? The doctrine of the common law in regard to trade-marks is, that "every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior reputé, as his, may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale." (*Amoskeag M'fg. Co. v. Spear*, 2 *Sandf. S. C. R.*, 599.) The Paris white, Venetian red, drop black, and other goods which were sold by the plaintiffs, had acquired a distinctive character and reputation in the market, under the name of the "crown" brand, which name indicated to the public the origin or ownership of the goods. But the white lead or the zinc which the plaintiffs sold had not acquired a distinctive character under the name of the "crown" brand, because they had

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not applied that name to either of these articles. Previously to the time of the registration, the plaintiffs had not, therefore, become entitled to the exclusive use of the representation of a crown upon all paints; but their right to the exclusive use of the mark was limited to the articles to which it had been appropriated. By registering this mark in the Patent Office, and appropriating it to all paints, they cannot, in my opinion, prevent the defendants from the use of the mark upon a class of goods to which they had applied the mark prior to the registration, especially as the plaintiffs have not, since the registration, extended actual use of their mark to that class. If a manufacturer of cotton tickings, who had acquired the right to the use of a trade-mark upon his tickings, should register his mark, and declare that it was intended to be appropriated to all manufactures of cotton, he would not be thereby enabled to restrain a manufacturer of shirtings who had previously placed the same mark upon his own manufactured article. The plaintiffs had acquired a valid right, at common law, to the use of the mark upon those kinds of paints to which it had been appropriated prior to the registration. The statutory right which they acquired by the registration (and which statutory right is the foundation of this bill) did not enable them to extend their exclusive right to the use of the mark upon all paints, as against a manufacturer who had previously used the same mark upon a particular class of paints, to which kind or class the plaintiffs had not appropriated the mark.

The bill should be dismissed.

*Alexander H. H. Dawson*, for the plaintiffs.

*Hugh L. Cole*, for the defendants.

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Davis v. The Massachusetts Mutual Life Insurance Company.

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L. L. DAVIS, ADMINISTRATOR OF JERRY B. SWEATLAND

vs.

THE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

A policy of life insurance by a company, on the life of S., declared that it was issued and accepted upon the express conditions, that it "shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured; that no premium, or instalment of premium, hereon, shall be considered as paid, unless a receipt shall have been given therefor at the time of payment, duly signed by the president or secretary of said company; that no agent of the company shall make any contract binding the company, nor alter or change any condition of the policy, nor waive forfeiture of this policy." The policy was put into the hands of S., by an agent of the company, who informed S., at the time, that there was no hurry about his paying the premium. Thereafter S. died, still retaining the policy, but without having paid the premium, and without any receipt for the premium having been given to him: *Held*,

- (1.) It is to be inferred, from the fact that S. retained the policy, without objection, that he accepted its terms and provisions;
- (2.) The premium was not paid, as between S. and the company;
- (3.) The agent attempted to give a credit to S. for the amount of the premium, in violation of the conditions of the policy;
- (4.) The attempted waiver by the agent was not effectual, and the policy never took effect.

(Before SHIPMAN, J., Vermont, July 25th, 1876.)

SHIPMAN J. This case was tried by the Court, upon the following agreed statement of facts, a jury having been waived by the written stipulation of the parties: "The plaintiff's intestate, Jerry B. Sweatland, resided in Richford, in this District, and was the keeper of a hotel. The defendants are a corporation created by the laws of the State of Massachusetts, with headquarters at Springfield, in that State. On the 1st of August, 1873, and for two years before, one M. V. B. Edgerly, of Manchester, N. H., was the general agent of defendants for a portion of New England, including the State

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of Vermont. For the same time, one Charles Parkhurst was special State agent for Vermont, for the purpose of soliciting applications for insurance in said company, delivering policies and collecting premiums thereon, appointed by said Edgerly, with headquarters at Burlington, Vermont. About April 1st, 1872, Parkhurst employed one H. M. Buxton to solicit applications for insurance, and it was also Buxton's duty, under such employment, to collect premiums on policies that were placed in his hands, and thereupon to deliver premium receipts and such policies to the assured. Said Buxton made monthly remittances of all such premiums so collected to Parkhurst, keeping an account of all such applications, policies delivered and not delivered, payments, &c., in a book, which account was the only one kept by Buxton with the company, or in the insurance business. Parkhurst's compensation, as agent, was a certain commission reserved out of all said premiums. He employed Buxton as sub-agent, and paid him an annual salary for his services. The above comprised all the duty and authority of said Buxton under such employment. All his communications about the defendants' business were with Parkhurst. Parkhurst was under bond to the defendants. Buxton was not under bonds to Parkhurst or the defendants. Neither Edgerly nor Parkhurst had any authority to grant insurance, and all the authority Buxton had was derived from said employment by Parkhurst. Buxton's headquarters were at St. Albans, Vermont, and he was at the time subject to the orders of Parkhurst, but his work was done mainly in Franklin, Grand Isle, and Lamoille counties. Richford is 28 miles from St. Albans, and Buxton was in the habit of going there once each month, and, while there, stopping sometimes at Sweatland's hotel, and sometimes at another hotel in the place. On June 4th, 1873, Sweatland executed and delivered to Buxton an application for insurance, signed by him. Buxton sent the same to Parkhurst, the latter transmitted it to Edgerly, and the latter to the defendants, at Springfield. The same was accepted by the defendants, and, on the 13th day of June, 1873, they made out and signed a

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premium receipt and policy. They sent the same to Edgerly, general agent, at Manchester, who received and stamped the same June 16th, 1873, and forwarded the said premium receipt and policy to Parkhurst, at Burlington. About the last of June, 1873, Parkhurst sent the same to Buxton, at St. Albans. On the 1st of July, 1873, Buxton wrote a letter to Sweatland, of which the following is a copy: 'St. Albans, Vt., July 1st, 1873. Jerry B. Sweatland, Esq., Dear Sir: Enclosed find your policy. You can send the amount due by C. M. Searle, if you wish, and I will return you receipt for the same, or you can pay it to me when I am up next time, as you please; no hurry about it. Yours, very truly, H. M. Buxton.'—and sent the policy, with the letter, by the hand of C. M. Searle, therein named, to Sweatland. Searle was a mail agent, running between Richford and St. Albans, daily. Said policy and letter were received by Sweatland on or about said 1st of July, and they were found among his papers after his decease, and, after said letter, no communication of any kind was had between Sweatland and Buxton, or Sweatland and the defendants, in respect to the policy or anything else. The premium provided for in the policy was never tendered or paid by Sweatland, or by any one on his behalf, to Buxton, or the defendants, or any one in their behalf, before Sweatland's decease. Said premium receipt was never delivered to Sweatland or asked for by him, but remained in Buxton's hands after his receipt of the same from Parkhurst, until one or two days after Sweatland's decease, when Buxton returned it to Parkhurst. Said Sweatland was, at the time he received said policy, in perfect health, and so continued until the 15th of July, 1873, when he died in an apoplectic fit. No question is made but that all the requirements of the policy as to notice of death, and all other matters, subsequent to the decease of said Sweatland, have been complied with. The plaintiff offers to show by E. H. Powell, his attorney, and, if competent or admissible against defendants' objection, it may be taken as proved, that, a few days after the decease of Sweatland, the said Buxton told him, said Powell, that he thought

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the company would make no question about the claim, and that it was not necessary to make any tender of the premium which the said Powell then had and proposed to pay, and otherwise would have tendered to said Buxton, as agent for defendants." The application of Sweatland, a copy of which was partly written and partly printed upon the back of the policy, contained the following agreement: "And it is hereby further agreed, that, under no circumstances, shall the policy be in force until the first premium, as stated in the policy, shall have been paid, during the lifetime of the said party whose life is hereby proposed for insurance, to the company, or to an agent duly authorized by the company to receive payments of premiums, and that no premium, or instalment of premium, shall be considered as paid, unless a receipt shall have been given therefor, at the time of payment, duly signed by the secretary or president of the said company." By the policy, the defendants, "in consideration of the declarations and statements made in the application for this policy, and of the annual premium of \$32 80, to be paid on or before the 13th day of June, at noon, in each and every year during the continuance of the policy, do insure the life of Jerry B. Sweatland, \* \* \* in the amount of one thousand dollars, for the term of life;" and the company promised to pay the sum insured to the said Jerry B. Sweatland, his executors, administrators, or assigns, "said sum insured being for the express benefit of Mary B. Sweatland, wife of the said Jerry B. Sweatland." The policy was "issued and accepted upon the following express conditions: \* \* \* *Second.* That this policy shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured. \* \* \* *Third.* That no premium or instalment of premium hereon shall be considered as paid, unless a receipt shall have been given therefor at the time of payment, duly signed by the president or secretary of said company. \* \* \* \* *Eleventh.* That no agent of the company shall make any contract binding the company, nor alter or change any condition

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of this policy, nor waive forfeiture of this policy." The book of Buxton contained a list of the policies which he had received, with the numbers, names of the insured, and other important memoranda in relation to each policy, arranged in tabular divisions or columns. Under the head of "premiums received," and "when received," opposite the name of Jerry B. Sweatland, were blanks, and the words "died July 15, 1873," were written against his name.

In order to determine the principles of law which are applicable to this case, it is necessary for this Court to find the inferences of fact which are properly deducible from the agreed statement of facts.

(1.) From the retention of the policy, without objection, by Sweatland, for fifteen days, under the circumstances which have been detailed, the Court is authorized to infer an acceptance of its terms and provisions.

(2.) Was payment of the premium actually made, as between the insured and the company? If Buxton had undertaken, either expressly or impliedly, to pay the premium to the company, and to make Sweatland his own debtor therefor, the transaction would have been equivalent to payment. Cases of this kind are not infrequent. But there is an entire absence of evidence that there was any such express or implied agreement or understanding between them. On the other hand, the letter of Buxton furnishes evidence that the premium was not paid, as between the insured and the company. The agent says, "you can send the amount due, and I will return you receipt for the same"—showing that no receipt was to be given, and indicating that no payment was to be considered as made, until the money was actually received. Buxton's book-keeping confirms this view. The question is answered in the negative.

(3.) Did Buxton attempt to alter the condition of the policy, requiring a prepayment of the advance premium before the policy should take effect, and to give a credit to Sweatland for the amount? If the provisions of the policy are agreed to and accepted by the insured, "where the policy



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is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended." (*Miller v. Life Ins. Co.*, 12 Wall., 303.) This is not a conclusive presumption, but the question whether credit was intended is one of fact, and there is not an unyielding rule of law implying such a result from the mere fact of the delivery of an executed contract. Waiver is the act of the company, acting through its duly authorized agents. The intention of the only person who acted in this matter is to be gathered solely from his letter, in which he says, "you can send me the amount due by C. M. Searle, if you wish, and I will return you receipt for the same, or you can pay it to me when I am up next time, as you please. No hurry about it." If he had not added the last clause, the letter might have been construed to mean—you can examine the policy and send me the money, and I will return you receipt, it being well understood that the policy does not take effect until the premium is paid; but, when the writer says, there is "no hurry about it," it indicates that he intended that the policy should be subsisting; otherwise, there was need of promptness, as the event proved. If it was desirable to the insured that the policy should take effect, it was also desirable that he should take the proper steps to make it effectual. Although Buxton knew of the express provisions of the policy, he probably relied upon the continuance of the life of a man who was apparently in good health, and, in the expectation that payment would be made in the future, he took the unauthorized liberty of disregarding the terms of the contract. I am, therefore, of opinion, that the presumption which is to be inferred from delivery has not been overcome by the defendants.

It having been thus found, as matter of fact, that there was an attempted waiver by Buxton, the question of law arises—was the attempted waiver effectual? It is not necessary, under the provisions of this application and policy, to consider any distinction between the powers of a general agent, by which term I mean an agent who is authorized to

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make contracts of life insurance, and the powers of a sub-agent, who is employed "to solicit applications for insurance, and, under such employment, to collect premiums on policies that are placed in his hands, and thereupon to deliver premium receipts and such policies to the assured," and whose powers are coextensive with the business intrusted to his care, because, in my opinion, the powers of any person who was an agent, and not an officer, of the company, to vary the terms of the contract which had been entered into between the company and Sweatland, had been taken away, and the prohibition of the exercise of such powers was known to Sweatland. The provisions alike of the application and of the policy declare that the policy will not take effect, unless prepayment has been made. This condition could have been waived by the company, or its duly authorized agent, unless the agent had been prohibited from varying the terms of the policy, and that restriction of his powers had been brought home to the knowledge of the insured. In this case, the contract, which the insured had in his possession, bore upon its face the restriction of the powers of any agent, as to the alteration of the provisions of the policy. Sweatland had expressly agreed, in his application, that under no circumstances should the policy be in force until the first premium had been paid during his lifetime. This agreement was embodied in the policy to which he had also assented, and which informed him that an agent could not vary or alter one of its conditions. In the absence of fraud or imposition, it is conclusively presumed that a party to a written contract which has been received and accepted by him, knew of its terms. (*Rice v. Dwight Mfg Co.*, 2 *Cushing*, 80; *Grace v. Adams*, 100 *Mass.*, 505; *Hopkins v. Westcott*, 6 *Blatchf. C. C. R.*, 64.) In this case, under the express provisions of the contract, credit must be given, or be sanctioned, by the company, acting through its board of directors, or those executive officers who represented the company in this policy. Unless so made or sanctioned, the attempted waiver is ineffectual. The company would have had the power, notwithstanding the

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terms of the policy, to invest its agent with authority to waive its provisions, but no attempt has been made to show that the company ever sanctioned the act of Buxton. (*Union Mut. Life Ins. Co. v. McMillen*, *Supreme Court of Ohio*, 1873, 4 *Bigelow's Life & Accident Insurance Reports*, 384.) There being no evidence of such sanction, Sweatland knew that he had not paid the premium, that Buxton had no authority to waive prepayment, and that the policy had not become effectual.

The decision of this point renders it unnecessary to determine whether the suit was properly brought in the name of the administrator.

Let judgment be rendered for the defendants.

*E. Henry Powell*, for the plaintiff.

*Guy C. Noble*, for the defendants.

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 ABRAHAM B. MILLER

vs.

THE MAYOR, &C., OF THE CITY OF NEW YORK AND OTHERS.  
IN EQUITY.

A citizen of New York brought suit in this Court against the municipal corporations of the cities of New York and Brooklyn, and certain individual citizens of New York, to restrain the building of a bridge in New York across the East River, a navigable river, on the ground that it would be a public nuisance: *Held*, that this Court had no jurisdiction of the suit, so far as any question of a violation of the law of New York was concerned, but that it could take jurisdiction to enquire whether the bridge was being so built as to violate the Constitution or laws of the United States.

The history of the legislation of New York and of the United States, in regard to such bridge, reviewed.

Under such legislation of the United States, if the bridge is constructed in conformity with the requirements of law, it follows that the navigation of the

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river will not thereby, in contemplation of law, be obstructed, impaired or injuriously modified.

Congress had power to authorize, as a regulation of commerce, the building of the bridge in the prescribed manner.

It appearing that the bridge was being constructed according to the requirements of the legislation of Congress, and that the State of New York had, by subsequent legislation, sanctioned its being constructed in such manner, an injunction to restrain its erection, as a public nuisance, was refused.

(Before JOHNSON, J., Southern District of New York, August 4th, 1876.)

JOHNSON, J. The plaintiff in this suit is a citizen of the State of New York, and the defendants are the municipal corporations of the cities of New York and Brooklyn, and also certain individual citizens of the State. This Court, therefore, derives no jurisdiction from the citizenship of the parties, for it is, in general, only when there is a controversy between citizens of different States that jurisdiction is conferred upon the ground of the citizenship of the parties. We must look, therefore, to the subject-matter of the suit, to sustain the jurisdiction. The Circuit Courts of the United States have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature, at common law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. (*Act of March 3d, 1875, § 1, 18 U. S. Stat. at Large, 470.*)

The claim of the plaintiff is, that the proposed bridge over the East River, between the cities of New York and Brooklyn, will be a public nuisance, from which he will suffer a particular private injury, other than the common injury which every citizen suffers from a public nuisance. Now, if the bridge will be a public nuisance, it must be because it will violate the law of New York or that of the United States. For a violation of the law of New York the plaintiff cannot come into this Court. He and the defendants are citizens of New York, and he must seek his remedy from the justice of that State. Jurisdiction in that behalf between citizens of the same State is not conferred upon the

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Circuit Courts of the United States. In *The Passaic Bridge Cases*, (3 Wallace, 789), Mr. Justice Grier, giving judgment in the Circuit Court for the District of New Jersey, said: "The complainants in these bills, in order to show jurisdiction in the Court, have stated themselves to be citizens of the State of New York. Their right to a remedy in the Courts of the United States is not asserted on account of the subject-matter of the controversy, but they rest upon their personal right, as citizens of another State, to sue in this tribunal. It is plain, by their own showing, that they can demand no other remedy from this Court than would be administered by the tribunals of the State of New Jersey, in a suit between her own citizens. A citizen of New York who purchases wharves in Newark has no greater right than the citizen of New Jersey." In the case now before this Court, a citizen of New York sues corporations and citizens of New York. That alone does not make a case of jurisdiction in this Court, nor would the jurisdictional difficulty be avoided by the existence of a cause of action for a violation of the law of New York. On neither ground, nor on both combined, can this Court entertain jurisdiction. Just as diversity of citizenship, in the case before Judge Grier, required him to administer the law of New Jersey between the parties in that suit, so, identity of citizenship in this case excludes a violation of the law of New York from being the subject of redress in this Court between these parties. Here, the subject-matter of the suit alone gives jurisdiction, and it must, in its exercise, be confined to that subject-matter.

The inquiry is, therefore, whether, by the Constitution or laws of the United States, the bridge in question will be a public nuisance and specially injurious to the plaintiff. If, upon inquiry, it shall be found that the bridge in question is being built in conformity with, and not in violation of, the Constitution and laws of the United States, then no Court of the United States can regard it as a public nuisance, nor undertake by injunction to interfere with its construction.

The Congress has legislated directly upon the subject of

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this bridge, and in that law has referred to the previous legislation of New York. It will, therefore, be most convenient to state, in their chronological order, the laws of the State and of the United States relating to the building of the bridge.

Chapter 399 of the laws of New York, of 1867, (*p.* 948), passed April 16th, 1867, created a corporation by the name of The New York Bridge Company, for the purpose of constructing and maintaining a permanent bridge over the East River, between the cities of New York and Brooklyn. To this corporation power was given to acquire and hold so much real estate as might be necessary for the site of the bridge, and of all piers, abutments, walls, toll houses, and other structures proper to said bridge, and for the opening of suitable avenues of approach to said bridge, but not any land under water, in the river, beyond the pier lines established by law. By the 10th section, it was further enacted, that the bridge should not be at a less elevation than one hundred and thirty feet above high tide at the middle of the river; that it should not obstruct any street which it should cross, but that such street should be spanned by a suitable arch or suspended platform as should give a suitable height for the passage under the same for all purposes of public travel or transportation; that no street running in the line of the bridge should be closed without full compensation to the owners of land fronting on the same, for all damages they might sustain; that the bridge should commence at or near the junction of Main and Fulton streets, in Brooklyn, and should be so constructed as to cross the river as directly as possible to some point at or below Chatham square, in the city of New York, not south of the junction of Nassau and Chatham streets; and that it should be built with a substantial railing or siding, and should be kept fully lighted through all hours of the night. This section was prefaced with a provision in these words: "Nothing in this Act contained shall be construed to authorize, nor shall it authorize, the construction of any bridge which shall obstruct the free and common navigation of the East River, or the construction of any pier in the said river,

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beyond the pier lines established by law." It will be observed, that this is not a prohibition of the obstruction of navigation. Appropriate language of prohibition is found immediately below—"it shall not obstruct any street which it shall cross." This provision is limited to enacting that the statute shall not be taken to authorize the obstruction of navigation.

This Act was followed, in 1869, by chapter 26 of the laws of that year, (*p.* 15), passed February 20th, by which, after providing for the representation of the two cities of New York and Brooklyn, in the Board of Directors of the Bridge Company, it was enacted that the company should proceed without delay to construct the bridge.

In the same year, an Act of Congress was passed, approved March 3d, 1869, (15 *U. S. Stat. at Large*, 336), which enacted, (§ 1,) that "the bridge across the East River, between the cities of New York and Brooklyn, in the State of New York, to be constructed under and by virtue of an Act of the Legislature of the State of New York, entitled, "An Act to incorporate the New York Bridge Company, for the purpose of constructing and maintaining a bridge over the East River, between the cities of New York and Brooklyn," passed April 16th, 1867, is hereby declared to be, when completed in accordance with the aforesaid law of the State of New York, a lawful structure and post road for the conveyance of the mails of the United States: *Provided*, that the said bridge shall be so constructed and built as not to obstruct, impair or injuriously modify, the navigation of the river; and, in order to secure a compliance with these conditions, the company, previous to commencing the construction of the bridge, shall submit to the Secretary of War a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of a mile above and below the site, exhibiting the depths and currents at all points of the same, together with all other information touching said bridge and river, as may be deemed requisite by the Secretary of War to determine whether the said bridge, when built, will conform

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to the prescribed conditions of the Act, not to obstruct, impair or injuriously modify, the navigation of the river." By the second section, it was further enacted, "that the Secretary of War is hereby authorized and directed, upon receiving said plan and map, and other information, and upon being satisfied that a bridge built on such plan, and at said locality, will conform to the prescribed conditions of this Act, not to obstruct, impair or injuriously modify, the navigation of said river, to notify the said company that he approves the same, and, upon receiving such notification, the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But, until the Secretary of War approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced, and, should any change be made in the plan of the bridge, during the progress of the work thereon, such change shall be subject likewise to the approval of the Secretary of War." It will be observed, that this Act of Congress takes up the subject of the effect of the bridge upon the navigation of the river, where it was left by the law of New York, and introduces positive provisions on the subject, in place of the merely negative provision of the New York statute. That statute goes no further than to say that it shall not be construed to authorize an obstruction, while the Act of Congress contains a provision, that the bridge shall be so constructed and built as not to obstruct, impair or injuriously modify, the navigation. It goes further and fixes the mode by which it shall be ascertained whether these conditions are observed in the plan of the bridge. The determination of this question is committed to the Secretary of War, who is directed, upon being satisfied that the bridge, as proposed, will not obstruct, impair or injuriously modify the navigation, to notify the company that he approves the bridge. When this has been done, the Act declares that the company may proceed to the erection of the bridge, conforming strictly to the approved plan and location.

If the foregoing is a correct interpretation of the Act of



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Congress, and if the steps pointed out in the Act have been taken, then there is the direct authority of Congress for proceeding in the construction of the bridge, in conformity with the approved plans, and a conclusive determination that the navigation of the river will not thereby be obstructed, impaired or injuriously modified, unless Congress does not possess the power thus to legislate. But, in the case of *The State of Pennsylvania v. The Wheeling Bridge Co.*, (18 How., 421,) the authority of Congress, under the Constitution, to authorize, as a regulation of commerce, that which the judgment of the Supreme Court had determined to be an obstruction of the navigation of the Ohio River, was maintained. The Court held, that the previous judgment had been given on the ground that the regulations of commerce, by authority of Congress, existing at the time, were contravened by the bridge, and that it, consequently, was unlawful. The new statute removed this unlawfulness, by adopting a new regulation of commerce. The first clause of the head note to the case states accurately the doctrine maintained by the decision: "The power of Congress to regulate commerce includes the regulation of intercourse and navigation, and, consequently, the power to determine what shall or shall not be deemed, in judgment of law, an obstruction of navigation." In that case, the State of Pennsylvania brought its suit in the Supreme Court of the United States, which had jurisdiction by reason of the character of the party, irrespective of the subject-matter of the action. The State was entitled to maintain its action by showing an obstruction unlawful either by the law of Virginia, or by the law of the United States; and, therefore, it was requisite, in giving judgment against its claims, to deny the unlawfulness of the obstruction, in both of its aspects. The bridge appeared to have the sanction of Congress and of the State Legislature, and so its lawfulness could not be impeached. But, all the cases in the Supreme Court, authoritatively decided, hold that the laws of Congress, in regulation of commerce, are paramount. Thus, in the case of *Willson v. The Blackbird Co.*, (2 Peters, 250), which

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came up by writ of error from the Court of Appeals of Delaware, of which State the plaintiffs in error (who were defendants below), were citizens, Chief Justice Marshall said: "This abridgment," (of the navigability of a river by a dam erected under a law of Delaware), "unless it comes in conflict with the Constitution or a law of the United States, is an affair between the Government of Delaware and its citizens, of which this Court can take no cognizance." He further observed, that, if Congress had passed any Act which bore upon the case, the Court would not feel much difficulty in saying that a State law coming in conflict with such Act would be void." The case was, however, disposed of on the ground that Congress had not exercised its power to regulate commerce in such a way as was repugnant to the law of Delaware in question, and that it, therefore, was not invalid.

The first determination in *The State of Pennsylvania v. The Wheeling Bridge Co.*, (13 How., 518), was only the other side of the same doctrine. There the Court held that Congress had regulated commerce upon the Ohio River in such a way as came in conflict with the legislation of Virginia, and that the action of Congress was paramount.

*Gilman v. Philadelphia*, (3 Wallace, 713), was a suit where the jurisdiction rested upon diversity of citizenship, and where a bridge about to be built by authority of a law of Pennsylvania was assailed as creating an unlawful obstruction to navigation, especially injurious to the rights of the plaintiffs as wharf and dock owners. All the Court agreed in the view, that the power of Congress was paramount, when exercised. The majority, however, held that it had not been so exercised as to require the Court to declare unlawful what was about to be done in pursuance of a law of Pennsylvania, and the decision was against the plaintiffs.

In this Circuit have occurred the cases of *The Albany Bridge*, (4 Blatchf. C. C. R., 74, 395, 1 Black, 582, and 2 Wallace, 403), and of *The Troy Bridge*, (11 Blatchf. C. C. R., 274), in each of which the lawfulness of a bridge built in pursuance of a law of the State of New York was

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finally sustained. In the Albany bridge case, an injunction was granted originally, but, upon final hearing, the judges of the Circuit Court differed in opinion, and the judges of the Supreme Court, likewise, were equally divided upon the question of the jurisdiction of the Circuit Court perpetually to restrain the erection of the bridge over the Hudson River, authorized by a law of the State of New York. The case was, therefore, remitted to the Circuit Court, and the bill was, consequently, dismissed. Upon appeal from this final decree, the Supreme Court was again equally divided, and the judgment, therefore, stood affirmed. In the last case, that of the Troy bridge, the question whether that bridge would cause a material obstruction to the navigation of the Hudson, if built in conformity to the law of the State of New York, was examined at the suit of a citizen of another State, who, as a navigator under a coasting license, was interested in the question, and it was held that such an obstruction would not be created by the building of the bridge in the manner authorized by the law of New York.

It results from the cases considered, that the authority of Congress is paramount, in the regulation of commerce, under the Constitution; and that its determination in respect to interference with navigation, by obstructions thereto, is conclusive. What it authorizes may be justified upon its authority. What it forbids is necessarily unlawful. Nor is it to be forgotten, that this power of Congress is at all times capable of exercise. If it should turn out that the judgment of Congress has been mistaken, and that navigation is injuriously affected, it can, by law, require the bridge to be altered or removed, and can adapt its regulation of commerce to its view of the public interests.

It remains to consider whether the authority of the Act of Congress has been pursued. It appears, from the papers presented on this motion, that the required papers were presented by the bridge company to the Secretary of War, and that after a careful investigation, through the corps of engineers and a special commission appointed for the purpose

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from that body, the Secretary of War made his decision in writing, under date of June 19th, 1869, signed with his hand, and endorsed upon the report to him of the chief of engineers. By that decision he approved the plan as so reported, with the single modification, that the height of the centre of the main span of the bridge should not be less than 135 feet in the clear, at mean high water of the spring tides, and provided that the structure should conform in all other respects to the conditions recommended by the commission. By the same document he directed the chief of engineers to furnish the bridge company with a copy of the report of the commission, and a copy of the report on which his endorsement was made, and to notify the company that the plan and location of the bridge were approved, subject to the conditions imposed in that endorsement. On the 21st of June, 1869, the chief of engineers wrote to the president of the bridge company, in pursuance of the orders of the Secretary of War, as follows: "Sir—I am directed by the Secretary of War to inform the New York Bridge Company that he approves the plan and location of the East River bridge, as reported by the company to the commission instituted by orders from the War Department, provided the bridge conform to the following conditions:" These conditions are then specified, in accordance with the decision of the Secretary, but are not necessary to be here stated.

The substance of the requirement of Congress was, that the Secretary of War should approve the plan, and that, upon such approval and notice thereof, the company should have authority to proceed. It was not, in my opinion, necessary that the notice to the company should be under the hand of the Secretary himself. It suffices that he, in writing under his hand, made the determination, and directed the notice to be given, and that it was given accordingly. It is not claimed that any departure has occurred, in the actual construction of the bridge, from the plans and conditions imposed by the Secretary of War, nor that any such departure is intended; and, therefore, if I am right in the

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positions before maintained, the plaintiff is not entitled to the writ of injunction which he asks from this Court.

But, if it should be considered necessary that any further assent or approval should be given by the State of New York to the construction of this bridge in the manner proposed and sanctioned by the Secretary of War, I am of opinion that such assent has been given by the Act of the Legislature of New York, passed May 14th, 1875, (*Laws of New York, of 1875, p. 290.*) This Act was passed years after the transactions heretofore commented on, and after the form and conditions for the construction of the bridge were settled so far as the company and the United States could settle them, and the work had progressed far towards its termination. The Act in question is entitled, "An Act providing that the bridge in the course of construction over the East River, between the cities of New York and Brooklyn, by the New York Bridge Company, shall be a public work of the cities of New York and Brooklyn, and for the dissolution of said company, and the completion and management of the said bridge by the said cities." By force of and under its provisions it became the law of New York, that the bridge in course of construction over the East River should be completed and managed as thereafter provided, for and on behalf of the cities of New York and Brooklyn, as a consolidated district. The said bridge was thereby declared to be a public highway, for the purpose of rendering the travel between the said cities certain and safe at all times. It was further declared, that, from and after the dissolution of the company, the said bridge "shall be a public work, to be constructed by the two cities for the accommodation, convenience and safe travel of the inhabitants of the said district;" and that "the said bridge, and all its appurtenances, and all the property and effects connected therewith, shall vest absolutely in the cities of New York and Brooklyn." By this legislation, the bridge, in its entirety, as then contemplated, became a public work, and received the sanction of the State of New York. No indictment against the two cities for erecting or maintaining it, founded upon the idea of its being a nui-

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sance, could have been supported in the Courts of New York, and, of course, the plaintiff could not there have effectually asserted what the State itself could not have maintained.

I have not thought it worth while to advert to the very indirect interest of the plaintiff in the question involved. He is not a navigator, nor interested in navigation directly. He is a warehouse keeper, and the more vessels that can come near his warehouses the better are his chances of getting business. Whether an obstruction below him will be an injury or a benefit when the Hell Gate channel is cleared out, is, at least, problematical. Nor has it seemed necessary to notice the delay of six years, during which several millions have been expended on the bridge, while the plaintiff could have proceeded at once to present the question for judicial consideration.

The motion for an injunction must be denied.

*William H. Arnoux*, for the plaintiff.

*Charles H. Tweed* and *Edgar M. Cullen*, for the defendants.

JOHN H. PLATT, ASSIGNEE IN BANKRUPTCY OF SIMEON  
LELAND & Co.

vs.

ALEXANDER T. STEWART AND OTHERS. IN EQUITY.

Evidence considered, as to whether a debtor was insolvent at the time he conveyed certain real estate to a creditor, to apply on a debt due to such creditor, and as to whether the creditor had reasonable cause, at the time, to believe that such insolvency existed.

L. owned the furniture in a hotel, upon which furniture he had given chattel mortgages to S., the owner of the hotel, as security for the rent of the hotel. L. becoming insolvent, executions were levied on such furniture under judgments recovered after the giving of such mortgages. Subsequently, L. was adjudged a bankrupt, and his assignee in bankruptcy brought this suit against S. and the execution creditors, to set aside the mortgages and the judgments and to have awarded to him the proceeds of the furniture. The Court set aside the mortgages, but awarded the proceeds of the furniture to the execution creditors.

Liens by execution upheld as valid, as against an assignee in bankruptcy of the debtor, where the judgments were for just debts, due and payable, and were obtained not only without the slightest aid or concurrence of the debtor, but generally in spite of his active and unjustifiable opposition.

Under the statute of New York in regard to the filing of chattel mortgages, (*Laws of New York, of 1833, chapter 279, p. 402, section 2, Act of April 29th, 1833*), where the mortgagors in a chattel mortgage resided in Westchester county, and not in the city of New York, and the mortgage was filed in the latter place, and not in the former: *Held*, that the mortgage was void as against creditors of the mortgagor, represented by his assignee in bankruptcy.

Under section 8 of the same Act, in regard to the refileing of a copy of the mortgage, "together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof," a statement in regard to a mortgage given as security for rent to accrue on a lease of real estate, merely said: "I hereby certify that the lease within referred to still exists in full force, and the interests of the parties, and my interests, thereunder remain unchanged, except so far as the same have been altered by the payment of rent accrued:" *Held*, that such statement was insufficient.

The mortgage, a copy of which was refiled with such statement, described the

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property it covered by referring to a schedule annexed to it, and a copy of such schedule was refilled with the copy of the mortgage. The schedule described the property only as the goods and chattels described in a prior mortgage made by the mortgagors to the mortgagee, and in the schedule thereto attached, and filed in a certain office at a certain date, and all other goods and chattels in a certain building: *Held*, that, under § 3 of said Act, such description of the property was not a sufficient statement of the property remaining subject to the mortgage at the time of such refilling.

The lessees having agreed by the lease to give to the lessor, as security for the accruing rent, a chattel mortgage, and to renew and extend it, from time to time, "as shall be necessary to effect that purpose," and that such mortgage "shall be a continuing lien and security for the payment of such rent," and the mortgages given being held void as against creditors: *Held*, that such agreement in the lease did not secure to the lessor, aside from a lien by a valid mortgage, any lien as against other creditors who were in a condition to contest his lien.

The mortgage being void as to creditors, no title to the mortgaged property passed to the mortgagee by reason of a failure to pay the rent, so as to cut off any right creditors would otherwise have to contest the mortgage.

*Held*, also, that this action was well brought by the assignee in bankruptcy, and could be maintained, (1st), because, by § 35 of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 584), he is expressly empowered to bring an action to recover property fraudulently conveyed by the bankrupt; (2d), that, there being creditors who had liens on the personal property covered by the chattel mortgages, the assignee might maintain the action as representing them, although he denied the validity of their liens; and (3d), that, the assignee having an unquestioned standing in Court as to a portion of the fund, it is proper that all the trust fund, and the conflicting claims to it before the Court, and which must ultimately be decided by it, should be passed upon in this suit.

(Before HUNT, J., Southern District of New York, August 16th, 1876.)

HUNT, J. On the 24th of March, 1871, a petition in bankruptcy was presented by George F. Bellows, a creditor, praying for an adjudication of bankruptcy against Simeon Leland & Co., a firm composed of Simeon Leland, Charles Leland, and Warren Leland. On the 1st of April following, the adjudication was made as prayed for.

S. Leland & Co. had, for several years, been the keepers of the Metropolitan Hotel, in the city of New York, under a lease from Alexander T. Stewart, and used and owned in the said hotel a large amount of furniture and other property.



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At the time of the bankruptcy, they were holding under a lease to expire on the 1st of May, 1871, at an annual rent of \$79,186, payable monthly on the first day of each month. The lease under which the Lelands carried on the hotel was dated April 30th, 1867, and contained the following provision : “ and upon further condition, that the parties of the second part shall, simultaneous with the execution and delivery thereof, execute and deliver to the party of the first part a first mortgage and lien upon all the furniture and chattels of every kind now contained in said hotel, and used by the parties of the second part for hotel purposes, and which mortgage or lien shall be a security for the payment of the rent hereby reserved ; and, on any default in the payment of such rent according to the terms of this instrument, the party of the first part may at once proceed to foreclose said mortgage or lien, and collect the amount of such rent from the sale of the property described or referred to in said mortgage or lien ; and also upon the further condition, that the said parties of the second part shall, every year during the said term, and within thirty days prior to each 30th day of April therein, execute and deliver to the party of the first part a renewal of said mortgage or lien, and also an additional mortgage, which shall be a first lien, from the day of delivery thereof, upon all the additional furniture and chattels of every kind then contained in said hotel, and used by the parties of the second part for hotel purposes, and not covered by the said first mortgage, and, on any default in the payment of the rent hereby reserved, the party of the first part may proceed to foreclose such mortgages and collect the amount of such rent remaining unpaid, from the sale of the property in said mortgages described or referred to ; and if, at any time during such term, the said parties of the second part shall fail or neglect to so execute and deliver to the party of the first part any such renewal, or additional mortgage or lien, then, and in such case, it is hereby expressly and mutually covenanted and agreed by and between the parties hereto, that the yearly rent reserved hereby shall thereafter

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be and become due and payable in advance on the first day of May in each remaining year of the term hereby demised, and the mortgage or mortgages held by the party of the first part at any time during the term hereby demised may be resorted to for the collection of the rent which shall at any time become due and be unpaid hereunder, whether payable in advance or otherwise, and, to that end, said mortgage or mortgages shall be a continuing lien and security for the payment of the rent hereby reserved." In performance of the covenants of this lease, on the 30th of April, 1867, the lessees executed to Mr. Stewart a chattel mortgage, covering all the furniture in said hotel, of which an inventory was annexed, to secure the payment of the rent reserved. The inventory purported to give, in detail, a statement of the furniture in every room in the house. This mortgage was filed on the 2d of September, 1867, in the office of the register of deeds of the city and county of New York. Other mortgages, or copies, were made and filed April 30th, 1868, and June 22d, 1869, to which it is not necessary particularly to refer. A chattel mortgage between the same parties, and for the same purpose, dated April 30th, 1869, acknowledged August 2d, 1869, was filed on the 4th of August, 1869. It is upon this mortgage, and its renewal, filed July 8th, 1870, that the questions respecting the validity of the mortgage security arise.

The chattel mortgage dated April 30th, 1869, purports to transfer "all the household and hotel furniture and chattels belonging to us, and all other goods and chattels mentioned in the schedule hereto annexed, and now in the building known as the Metropolitan Hotel, \* \* \* to have and to hold," &c. The schedule referred to was as follows: "Schedule referred to in the within chattel mortgage—All the goods and chattels described in, and referred to in, a certain chattel mortgage, dated April 30th, 1867, made by us to said Stewart, and also in the schedule attached thereto, filed in the register's office of the city of New York, on or about September 2d, 1867, together with all other household or hotel

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furniture, goods or chattels, of every description, belonging to us, and now in or upon the building known as the Metropolitan Hotel, on Broadway, Prince and Crosby streets, in the city of New York." On the 8th of July, 1870, a copy of this mortgage, with the schedule attached, was filed in the office of the register of the city of New York, and upon such copy was endorsed the certificate following: "I hereby certify that the lease within referred to still exists in full force, and the interests of the parties, and my interests, thereunder remain unchanged, except so far as the same have been altered by the payment of rent accrued. Dated New York, July 8th, 1870. Alex. T. Stewart." On the 1st of July, 1870, the lessees failed to pay the rent due on that day, and, from that time until their bankruptcy, were in arrear, never thereafter paying the rent when due. On the 8th of July, 1870, the date of the last refiling, the amount in arrear was \$32,994 15. At the time of executing these mortgages and the renewals, the mortgagors, and each of them, were residents of towns in the county of Westchester, New York, and neither of them was a resident of the city of New York. The question of the lien secured by the lease, and the questions arising upon the chattel mortgages, will be considered hereafter.

On the 24th of January, 1871, a deed of two houses and lots on Crosby and Jersey streets, in the city of New York, executed by Charles Leland, was delivered to Mr. Stewart. There was then rent in arrear to the amount of \$61,001 43. Houses, numbers 137 and 139 Prince street, were conveyed by Charles Leland to Mr. Stewart, by deed acknowledged on the 13th of February, 1871. The Thomas farm was conveyed to Mr. Stewart by Ellen Leland, by deed acknowledged on the 4th of February, 1871. The validity of these conveyances, and of the chattel mortgages to Mr. Stewart, is impeached by the assignee.

I will consider, first, the questions arising upon the conveyances of the real estate. The assignee insists that these pieces of property were conveyed by the bankrupts, or caused by them to be conveyed, to Mr. Stewart, within four months preceding their bankruptcy, by way of an unlawful preference to him on account of a large indebtedness for rent of the Met-

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ropolitan Hotel, and in fraud of the provisions of the bankrupt Act. The conveyances were, confessedly, made within the four months specified. The title of the two houses and lots on Crosby and Jersey streets was in Charles Leland. The property was encumbered to \$8,000, and was worth \$30,000. Its net value was \$22,000. This property was in fact owned by the firm, but was kept in the name of Charles, who was a single man. The purpose is a matter of some doubt. The Thomas farm, in Westchester county, stood in the name of Warren Leland's wife, but was, in fact, owned by him. This farm was of the value of \$27,500, and was encumbered to \$8,000, its net value being \$19,500.

The questions to be determined are: (1.) Were the Lelands in an insolvent condition when these conveyances were made? (2.) Had Mr. Stewart, or his agent, Mr. Hilton, reasonable cause to believe them to be thus insolvent when the conveyances were taken?

On the first point, it is shown that the debts proven in bankruptcy against the firm of S. Leland & Co. amounted to \$286,000, and the debts against Leland Brothers, (Warren and Charles,) to \$181,166. The debts proved against Warren Leland, individually, amounted to \$104,139, but the assignee states that he had not then determined whether they were valid claims. The assignee also testifies that he has received nothing from the estate of S. Leland & Co., not even enough to pay his expenses, and that, in his opinion, after paying prior liens and incumbrances, there will be nothing left for the payment of the general creditors of S. Leland & Co. So far as it appears, the value of the real estate conveyed to Mr. Stewart, and the proceeds of the sale of the furniture, hereafter to be considered, are the sole subjects of value that belonged to the estate, and these are the subjects of contention between conflicting incumbrancers. For the general creditor, there appears to be nothing to contend about.

The debt to Mr. Stewart for rent, as has been stated, was about \$60,000 when the deeds were taken. This debt Mr. Stewart required to be paid, and he avers, in his answer, that he refused to treat for an extension of the lease of the hotel,

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(which would expire on the 1st of May, 1871), until this debt was paid in whole or in part. Warren Leland testifies that Mr. Stewart said he must be secured in the rent before he could talk about a new lease.

The testimony of Warren Leland indicates, that, for months previous to their bankruptcy, the firm had been engaged in a struggle to maintain itself. The struggle was manful and commendable. The question is, whether, in January and February, 1871, it had not become a desperate one. He says, that, as early as in the October previous, they had not money enough to pay their notes and checks, hardly enough to pay the running expenses of the hotel, which was constantly losing money; and that, when he came from Saratoga, in October, he found checks out which they could not meet, and checks and notes held over, which they could not get up. This, he says, continued to their bankruptcy. The firm had been frequently sued before this time, and had employed counsel to put in defences, for delay. One or two bankruptcy proceedings had been commenced against them, which they had disposed of by paying the debts. The record shows numerous judgments recorded against S. Leland & Co. Thus, \$1,817, on two notes, one of them dated July 9th, 1870, one dated November 15th, 1870—suit commenced February 20th, 1871; also, \$2,678 36, February 24th, 1871, on a note due December 1st, 1870, to which the delay of an answer had been interposed; also \$801 01, February 7th, 1871, on a note due December 27th, 1870, summons served January 14th, 1871; also, a judgment, October, 1867, for \$5,301 03, appealed, and judgment for costs on affirmance, and upon the original and the additional judgment executions were outstanding; a judgment, \$1,089 15, March 14th, 1871, on a note dated July 9th, 1870, suit commenced January 4th, 1871, answer struck out as sham and frivolous; a judgment, \$2,188 62, March 14th, 1871, answer struck out February 6th, 1871, as sham and frivolous; a judgment, \$1,311 99, February 8th, 1871, answer struck out February 6th, 1871, as sham and frivolous; a judgment, November 12th, 1868, \$676 94,

for damages to a guest in loss of property, judgment affirmed by the Court of Appeals—executions issued upon both judgments before January 1st, 1871. Ten pages of the record are occupied in setting forth the record of suits and judgments, of which the above are specimens. In nearly all the cases the debts had become payable, and payment was neglected and refused, before January 23d, 1871. Mr. Leland's evidence shows that such refusal proceeded from inability to pay, and that they resorted to the usual expedient of insolvent debtors, to wit, sham and frivolous defences, to procure delay. He shows, also, that numerous sheriffs' officers were quartered upon him, eating up his substance.

Evidence is given of the hope and expectation of the Lelands to sell their furniture, and an extension of their lease, to Mr. Risley, for \$175,000. This expected sale was based upon a renewal of their lease for four years from May 1st, 1871. This renewal they never obtained, and, of course, it never became a proper subject of estimated value, as property. There was no reason to suppose that Mr. Risley would buy their furniture, unless he could also obtain an extended lease. If he had so desired, he could have accomplished it by attending the sale that was soon afterwards made. This furniture was estimated by one skilful man at \$90,000, and by another at \$47,000, and actually brought, at a sale expensively advertised and carefully conducted, the sum of \$43,469 31.

I think there can be no doubt, that, in January and February, 1871, the firm of S. Leland & Co. was irretrievably and hopelessly insolvent.

The next question is—Had Mr. Stewart, or his agent, Mr. Hilton, reasonable cause to believe that this insolvency existed, when the deeds in question were taken? The evidence is so voluminous that I do not undertake to state it, but content myself with a statement of results.

I cannot avoid the conclusion that Mr. Stewart and Mr. Hilton were more than willing to take this real estate in payment of the rent. It had accumulated to a very large amount.

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It was impossible for the Lelands to pay it except with this property. This real estate and the furniture mortgaged to Mr. Stewart constituted everything of value that they possessed. Their business was much depressed. They exhibited to Mr. Stewart and his agent a statement showing the falling off of their business to the extent of from \$8,000 to \$10,000 per month. The men who drank wine and indulged in extravagant expenditures, they said, did not now stop at the Metropolitan Hotel, but went further up town. To sell their furniture would be to end their business, and cut off all future payments. That these men were supposed to "live in palaces, and to drive four in hand," as Mr. Hilton states, would, under such circumstances, commend them to the favor of a prudent practical man like Mr. Stewart, is not to be credited. If this idea induced Mr. Hilton to omit all inquiry, and to believe them to be rich, it is to be observed, that Mr. Stewart nowhere confirms or approves this suggestion. His practical sagacity would scarcely permit it.

There were but two modes to be adopted by Mr. Stewart—first, to give indulgence, relying upon the security of his chattel mortgage; second, to obtain payment by means of the real estate. The result has shown, what any sagacious man well knows, that a chattel mortgage is the most precarious and uncertain of all securities for the payment of money. As a security upon property which wears out, which may suddenly disappear, and which is subject to more legal niceties than almost any other legal document, a chattel mortgage is seldom resorted to except in the absence of all other possibilities. I should be much surprised to learn that Mr. Stewart had ever, during his active business life, lent money on the security of a chattel mortgage, or received it for any purpose, when other security could be obtained. Leland testifies that Mr. Stewart stated to him that he did not consider the mortgage security as sufficient.

The manner in which this negotiation for the extension of the lease to the Lelands was conducted, is worthy of remark. A termination of the lease was fatal to the Lelands.

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They so understood it. The sale of the furniture could be well made with such extension, not at all without it. A threatening letter is written, requiring payment or that a lease will be made to other parties. This is done by Mr. Stewart's direction. A negotiation goes on in several interviews. Terms are discussed, varying from \$52,000 per year to \$70,000, as the rent, but nothing is decided. Mr. Stewart refuses to accede to any terms until the back rent is paid—in whole or in part, as he says—secured in the whole, as Warren Leland says. The inference from Mr. Stewart's testimony is, that this was not a preliminary condition, but, in his answer, he expressly so states, and Warren Leland testifies to the same purport. The only source from which such payment can be made or security given, is this real estate. The hope of the renewal was held out to the Lelands until a conveyance was obtained of this property. The negotiation was then terminated with little ceremony, by the execution of a lease to Mr. Tweed. There is strong reason to think, both that Leland never would have conveyed this property except in the confidence that his lease would be renewed by Mr. Stewart, and that Mr. Stewart fully understood this expectation. It was the effort of a struggling debtor to obtain favor, and of a fearful creditor to obtain security.

Again, it may be asked, why did Mr. Stewart receive these conveyances? He testifies that he did not want the property, but he wanted the money for his rent. The Lelands, on the contrary, did want the New York property, as it was adjoining the hotel they occupied, and a convenient auxiliary to it. No property was ever before taken in payment of rent by Mr. Stewart from the Lelands. Why, then, did Mr. Stewart take this real estate? The alleged reason of saving expenses of search, brokerage and commission, if a sale should be made by Leland, and the money paid, is scarcely a good one. If it was a purchase, a search would certainly be made by any prudent man, and it must be done through the means of a professional agent. No careful man would make a purchase for which he paid \$43,000, except after an examination of title. The fact that no examination



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of title and no search was made, and that the party did not think the property worth the sum asked for it, goes strongly to show that the grantee was desirous to obtain the property on any terms, and was willing to take the risk of incumbrances. This is not an indication of a *bona fide* purchase.

Mr. Leland testifies that he told Mr. Hilton, at the interview at his house, that suits were being pressed against him, that Hilton asked if Fitch, the counsel, could keep them off, and Leland said that he could. This is denied by Mr. Hilton. The three Lelands agree in the general character of these statements.

Mr. Stewart and Mr. Hilton testify that they had no doubt of the responsibility of the Lelands at this time. They both knew, however, that the Lelands were largely in arrear for rent, and Mr. Stewart directed Mr. Hilton to write them officially in regard to it. Mr. Stewart states that he was anxious to collect the rent, and more than once directed Mr. Hilton to look after it. He states that he did not wish to make the purchase, but Mr. Hilton advised him to make it, and told him that he might as well accommodate them by making the purchase.

It requires some confidence to suppose that Mr. Stewart was willing to take, from a solvent debtor, property that he did not want, in payment of a good debt, and for the purpose of accommodating his debtor. Business men who act upon this principle seldom succeed in making large fortunes. It is difficult to suppose that Mr. Hilton gave this advice, or that Mr. Stewart acceded to it.

Mr. Stewart states that he made no personal inquiries as to the Lelands' responsibility, and had no personal knowledge of suits against them, and that he left everything to Mr. Hilton. Mr. Hilton testifies that he believed the Lelands to be in a "splendid" condition, and that he gave Mr. Stewart a "glowing account" of their affairs. The examination and the cross-examination of each of these witnesses is very protracted. Without impeachment of their veracity, it may be doubted whether their evidence is equal in weight to the

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direct testimony given, and to the circumstances of the case, to the contrary. This case was but one of the many large transactions in which those gentlemen were engaged, and of much less importance to them than to the Lelands. To the latter it was everything, and they may be expected to possess a more accurate recollection respecting it than others. In the present controversy they have no possible interest.

I am of the opinion that both Mr. Stewart and Mr. Hilton had the reasonable cause to believe the Lelands insolvent, required by law, and that Mr. Stewart is chargeable with such knowledge.

The questions upon the furniture in the Metropolitan Hotel, and the claims upon it, are next to be considered. The circumstances in regard to the chattel mortgages upon this property, given to Mr. Stewart, have been fully stated, and will be referred to as may be necessary. On the 24th of January and the 3d of February, 1871, Oechs & Co. had obtained judgments against S. Leland & Co. to the amount of \$5,044 12, and issued executions thereon, which were levied upon this same hotel property. These judgments were obtained in spite of the strenuous opposition of the bankrupts. On the 17th of February and the 16th of March, 1871, Batjer & Co. obtained judgments against S. Leland & Co. for \$3,035 90, and issued executions thereon, which were levied on this hotel furniture. These levies were made before the filing of the petition in bankruptcy. Miller & Conger also obtained six judgments against the same firm, upon five of which, amounting in the aggregate to \$4,567 08, executions were issued and levied upon the hotel furniture, shortly before the petition in bankruptcy was filed. In March, 1871, to avoid the injury to result from the action of the conflicting claimants, the bankrupt Court issued to the marshal a warrant directing him to take possession of the hotel furniture, to sell it at public auction, and to bring the proceeds into Court, to be kept until the further order of the Court. This was done, and the proceeds of such sale, being a net sum of \$26,867 29, are now in Court, and represent the subject of this controversy respecting the hotel furniture. Mr. Stewart

claims the proceeds by virtue of his chattel mortgage, and the renewal thereof, and by virtue of the provisions of the lease, already set forth. Miller & Conger and the other judgment creditors claim the same by virtue of their execution levy upon the property, existing when it was taken from the sheriff's possession by order of the bankrupt Court, upon its warrant to the marshal. The assignee claims that all the liens and claims above mentioned are invalid under the bankrupt Act, and that each of them is superseded and overridden by the title of the assignee in bankruptcy.

(1.) As to the judgments and executions specified. I refer to them first, as their consideration will be brief. They were adjudged by the District Court to be invalid. This judgment was founded upon a consideration of the case of *Buchanan v. Smith*, (16 Wall., 277.) The construction generally given to that case, when this judgment was rendered, was much modified by the subsequent case of *Wilson v. City Bank*, (17 Wall., 473.) If that case had been before the learned judge who decided the present one in the District Court, I do not doubt that he would have held, as I do, that these judgments are valid, and the executions valid liens upon the property seized. They were for just debts, due and payable, and the judgments were obtained not only without the slightest aid or concurrence of the debtors, but generally in spite of their active and unjustifiable opposition. (See, also, *Cook v. Tullis*, 18 Wall., 332; *Tiffany v. Boatman's Institution, Id.*, 376.)

(2.) As to the chattel mortgages. Was the chattel mortgage of Mr. Stewart, and its renewal of July 8th, 1870, valid, so far as to give him a lien upon the hotel property in preference to an execution creditor or a *bona fide* purchaser? The statute of New York by which this subject is governed was passed April 29th, 1833, and is as follows, (*Laws of New York, of 1833, chapter 279, p. 402*): "§ 1. Every mortgage, or conveyance intended to operate as a mortgage, of goods or chattels, hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and con-

tinued change of possession, of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of this Act. § 2. The instruments mentioned in the preceding section shall be filed in the several towns and cities of this State where the mortgagor therein, if a resident of this State, shall reside at the time of the execution thereof, and, if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument. \* \* \* § 3. Every mortgage filed in pursuance of this Act shall cease to be valid, as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register aforesaid, of the town or city where the mortgagor shall then reside."

It is objected, in the present case, 1st, that these mortgages and renewals were all filed in the office of the register of the city and county of New York, and that none of them were filed in the towns of New Rochelle or Mount Vernon, in Westchester county, whereas the mortgagors were all residents of the State, and residents of the towns in Westchester county named, and none of them were residents of the city of New York; 2d, that the last two mortgages are defective in not having a sufficient specification of the property embraced, the reference to a schedule filed in 1867, and of property which was continually wearing out and being replaced, not being sufficient; 3d, that there is, in the renewal of July 8th, 1870, no sufficient statement either of the property remaining subject to the mortgage or of the interest of the mortgagee in it, that is, of the amount of his mortgage debt.

The first and the third of these objections I consider valid

ones. As to the omission to file in the proper office, the case is quite plain. It is proved, beyond question, that the residence of the mortgagors was in Westchester county. The peremptory condition, therefore, of the statute, by which alone validity is given to the mortgage, is wanting. In its absence, the statute declares that the mortgage shall be absolutely void. This proof must be affirmatively made by the mortgagee, and, in a case where there was no evidence of the residence of the mortgagor, the mortgage was held to be void. (*Smith v. Jenks*, 1 *Denio*, 580.) If there be an erroneous recital, in the mortgage, of the residence of the parties, it does not relieve the case. It might operate as a waiver or an estoppel as to the mortgagor; but, the statute was enacted for the benefit of creditors, and no agreement of the debtor can estop them or control their rights. (*Chandler v. Bunn, Lator's Supplement*, 167.) The statute has imposed a rigid and unbending condition, to wit, a filing in the place where the mortgagor actually resides, as a preliminary to the validity of the mortgage. Whether this condition is wise or otherwise, whether convenient or difficult of performance, is not for the Courts to say. The statute exacts it, and the Courts must see that it is performed.

The schedule and the specification in the renewal of July 8th, 1870, are insufficient under the statute. It is required, that, upon such renewal, to continue the mortgage in force, there shall be filed a "true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof." This statement is intended to supply the place of a new mortgage. It might be difficult to obtain a new mortgage at the end of a year. There would be no obligation on the part of the mortgagor to execute it, and no necessary inducement to him to do so. A convenient substitute, and one within the control of the creditor, was given by the section we are considering, and this substitute should contain all the essentials of an original mortgage. It should show, especially, what was the property thus subjected, and what was the amount

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claimed to be an incumbrance upon it. The detailed schedule is an important part of the mortgage, essential to be presented to an inquiring creditor. This creditor is entitled to have it presented in the renewal equally as in the original. No one would contend that the requirement to refile "a copy" of the mortgage would be complied with by giving a skeleton of its contents and making further reference to the original filed a year previously. The schedule is a part of the mortgage, and the rule is the same as to it.

Again, the specification on the refiling says: "I hereby certify that the lease within referred to still exists in full force, and the interests of the parties, and my interests, thereunder remain unchanged, except so far as the same have been altered by the payment of rent accrued." What information does this statement give to a creditor who should seek to ascertain the extent of Mr. Stewart's incumbrance? It simply informs him that the lease still exists. It does not inform him that there is \$32,994 15 of rent due and unpaid, and which Mr. Stewart claims to be secured by the mortgage. It leaves him to infer that the rent has been paid promptly as it accrued. The latter would be the legitimate inference, while, in fact, the sum mentioned was in arrear. (*Ely v. Carnley*, 19 N. Y., 496; *Van Heusen v. Radcliff*, 17 Id., 580.) Grover, J., says, in the first case: "It is important to creditors to know the amount of liens as well as their existence. Hence, the Act requires the filing of the instrument or of a true copy. A compliance with the Act will give the creditor full information as to the property mortgaged, the amount of the debt or condition of the mortgage, and to what extent the property can be made available for the payment of his debt. When the paper fails to accomplish these purposes, it falls short of the requirement of the statute. \* \* \* When a judgment creditor claims the property, in hostility to the mortgagee, the inquiry is—has the mortgagee complied with the statute?—if not, the statute makes his mortgage void. The cause of the omission is wholly immaterial, whether by accident or design."

I hold, therefore, that Mr. Stewart has no lien upon the proceeds of the sale of the hotel furniture, by virtue of his chattel mortgages.

(3.) As to the lien given by the lease. Much learning is found in the brief of the counsel for Mr. Stewart on this point. He strenuously insists that the lease contains in itself what amounts to a lien on the hotel furniture; and, again, that, if there has been a failure to perfect a lien, a Court of equity will carry out the agreement of the parties, and give the lien agreed by them to be given.

The doctrine is certainly true, that, where parties have agreed to give a lien upon specific property, but have neglected it entirely, or have done it imperfectly, equity will, in many cases, carry out the agreement, and cause to be done what the parties agreed should be done, and what ought to be done. What is the agreement of the lease in regard to a lien or security for the rent? It is, in effect, that the Lelands will give to Mr. Stewart a chattel mortgage on their furniture for such security, and will renew and extend the same, from time to time, as shall be necessary to effect that purpose. There is no agreement that he shall have a lien except in this form. It is agreed to execute "a first mortgage and lien upon all the furniture," "which mortgage or lien shall be a security for the payment of the rent," and, "on any default in the payment of such rent according to the terms of this instrument," the party "may at once proceed to foreclose said mortgage or lien." It is then provided, that, within thirty days prior to its expiration, the party shall execute "a renewal of said mortgage or lien, and, also, an additional mortgage, which shall be a first lien" "upon all the additional furniture." If the party fails "to so execute and deliver" "any such renewal or additional mortgage or lien," the rent shall become payable in advance. "Said mortgage or mortgages shall be a continuing lien and security for the payment of the rent hereby reserved." The expressions "mortgage" and "lien" are manifestly synonymous. The one is a repetition of the other in a new form. The tenor of the article

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and the detail of manner show that the lien intended to be secured was by the means of a chattel mortgage, and that the lien derived from such an instrument should be at all times "kept up." Accordingly, the article concludes: "and, to that end, said mortgage or mortgages shall be a continuing lien and security for the payment of the rent hereby reserved."

As against his debtors, Mr. Stewart has an equity which could be enforced, to apply the property or its proceeds, which occupy the position of the property, to the payment of his debt. He has not the lien of a vendor, if such could here exist. He has not the equity of a seller and former owner of the property. In what respect can his equity be distinguished from that of any prior mortgagee of a personal chattel, whose mortgage or its renewal is defective? A manufacturer sells a coach from his shop for \$1,000, and takes a chattel mortgage to secure the payment of the purchase price. His equity to have his money, and to have it from the property sold, may be conceded. But he places his security in a specific form of writing, as to which the statute declares that it shall be void unless certain conditions are complied with. If he fails to comply with them, his legal and his equitable security fail together. He has embodied his equity in the form of a legal document, and he must stand upon the security thus chosen. If his vendee gives another mortgage to a creditor, who complies with the statutory requirements, or if a creditor obtains judgment against him and levies his execution upon the coach referred to, no plea of a prior equity will avail the seller. His claim is postponed to that of the other creditor. It is not necessary to cite cases to sustain this position. In the view I take of this branch of the case, Mr. Stewart has not, and never had, a lien upon the hotel furniture or its proceeds, which would avail him against other creditors in a condition to contest it.

The considerations last mentioned furnish an answer to the suggestion, that, by the non-payment of the rent according to the terms of the chattel mortgage, the mortgage be-



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came forfeited and the title to the property became absolute in Mr. Stewart. It is not necessary to examine the elaborate legal argument on this point, or to refer to the authorities. As against creditors and purchasers, Mr. Stewart had no mortgage. The statute condemns his security as "absolutely void." No language can be more explicit. No title by forfeiture can pass by or through an instrument which has not, and could never have had, a legal existence. (*Ely v. Carnley*, 19 *N. Y.*, 498.) To hold that the title to personal property becomes absolute in the mortgagee upon failure to comply with the terms of the mortgage, in the sense that a subsequent purchaser or execution creditor cannot contest the first mortgage, would work an absolute nullification of the statute of 1833. By subjecting the property to the lien and claim of subsequent parties, the statute emphatically declares that the title is not absolute in the first mortgagee. (*Ely v. Carnley*, *supra*.)

The further question remains, of the right of the assignee to maintain this action. Mr. Stewart's counsel contends, that the assignee does not represent the creditors but the bankrupt only, and that, if his client's title is defective, the assignee cannot impeach it.

As to the right of the assignee to maintain an action to recover back the value of the real estate conveyed to Mr. Stewart by the Lelands, the case is provided for by the first clause in section thirty-five of the bankrupt Act. It is there enacted, that, if any person, being insolvent, with a view to give a preference to a creditor, shall make any payment or conveyance of any part of his property, such creditor having reasonable cause to believe such person to be insolvent, and that such payment or conveyance "is made in fraud of the provisions of this Act," "the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it." It has been shown already, that S. Leland & Co. were insolvent in January and February, 1871, in which months the deeds of the real estate were delivered to Mr. Stewart. Their insolvency was complete. It was hopeless and irretrievable, unless they could obtain from Mr.

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Stewart that to which they had no legal right, and which, in fact, they did not obtain—a four years' renewal of the lease of the Metropolitan Hotel. Knowing this to be their condition, a conveyance by them to Mr. Stewart, of \$43,000 worth of real estate, in payment of a precedent debt, was, in law, a conveyance with intent to give him a preference over their other creditors. They gave to him in a measure which they knew they could not give to all. The case would have been very different if Mr. Stewart had paid money or advanced value at the time. Such a transaction by their debtor, in an honest effort to sustain himself, is not forbidden. (See *Cook v. Tullis*, and *Tiffany v. Boatman's Institution*, *supra*.) It is no answer to this to say, that the Lelands expected to receive a renewal of their lease, and thus to retrieve their fortunes. Any other delusive expectation, as of receiving a legacy, or of drawing a prize in a lottery, or of making a fortunate speculation in stocks, would have furnished the same answer. In neither case would it be satisfactory. The law does not act upon such assumptions. Upon a view of their actual property and of their legal rights, they knew that it was impossible to continue their business or to pay their debts. They knew they paid to Mr. Stewart more than they could pay to others. They hoped, by giving to him such a preference, to obtain a favor and advantage in return. They knew, also, that it rested entirely in the caprice of Mr. Stewart, whether he would bestow or withhold that favor. This does not relieve them from the charge of intentionally giving one creditor a preference over others. Of the knowledge by Mr. Stewart and his agent, of the state of the affairs of the bankrupt, enough has been already said. Under such circumstances, the Act provides that the assignee may recover back the money or property so paid, conveyed or transferred; and it is for that purpose the present suit is brought.

As to that part of the action which relates to the proceeds of the furniture, it is insisted by the appellant that the case of *Gibson v. Warden*, (14 Wall., 244,) and the case of *In re Collins*, (12 Blatchf. C. C. R., 548,) are authorities against the

right of the assignee. The fact that this property has been converted into money does not alter the rights of the parties to it. Whatever liens there were upon the property itself follow the proceeds, and are liens upon the proceeds, to the same extent that they were upon the property itself. (*Astor v. Miller*, 2 Paige, 68; *Sweet v. Jacocks*, 6 Id., 355; *Gibson v. Warden*, *supra*.)

In *Bank of Leavenworth v. Hunt*, (11 Wall., 391,) this action by the assignee to recover goods held under a similar mortgage, that is, one void as to creditors only, was sustained. Such was, also, the case in *Allen v. Massey*, (17 Wall., 351.) In *In re Leland*, (10 Blatchf. C. C. R., 503,) Woodruff, Circuit Judge, held that the mortgage in such case was void as against the assignee in bankruptcy, and that he was entitled to recover the proceeds of the property, in the same manner as would creditors, had they obtained judgment. In two other cases, the same Judge has held that the assignee did not represent creditors, so far as to enable him to sue persons against whom rights of action were given to creditors by statute, as for individual responsibilities. (*Bristol v. Sanford*, 12 Blatchf. C. C. R., 341; *Dutcher v. Marine Bank*, Id., 435.)

In the present instance, there were existing, at the time this action was commenced, a large number of judgments and executions which had been levied upon the property in controversy. Several of these, to wit, those in favor of Miller & Conger and those in favor of Oechs and of Batjer, have been decided to be valid judgments and to give liens upon this property. Some others are, evidently, in the same condition. This brings the case within the rule laid down in the case of Collins, (*supra*,) and would justify the action, although the assignee does not claim by virtue of those judgments and executions, but seeks to avoid them. They do exist, however, and are valid liens, and are by law represented by the assignee. I think they sustain the right of action of the assignee as against the fraudulent mortgages.

Again, the assignee has an unquestioned standing in Court upon the point of the real estate conveyances. It is not un-

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reasonable that all the points respecting the disposition of the trust funds, and of the conflicting claims of parties to the fund, brought before the Court, and which must ultimately be decided by it, should now be passed upon. It is to the advantage of every one that that course should be taken.

My conclusions are, (1.) That the real estate conveyances to Mr. Stewart are void, and that he must make a reconveyance of the property to the assignee, and, in case of his inability to do so, pay the value thereof, which is proved to be the sums at which they were credited in account to S. Leland & Co.; (2.) That the chattel mortgages of Mr. Stewart upon the hotel furniture are void; (3.) That the judgments and executions of Miller & Conger, and Oechs, and Batjer are valid, and were liens on the hotel furniture; (4.) That from the fund produced by the sale of the hotel furniture, there be distributed and paid in payment of the judgments of Miller & Conger, and Oechs, and Batjer, the sums due upon them respectively, according to their legal priorities; (5.) That the attorneys and counsel of the said judgment creditors, defendants, be paid their taxable costs only out of said fund; (6.) That the residue, if any, be paid to the assignee, for the purposes of the trust. I see no reason for requiring the payments to the judgment creditors to be made by the assignee, or that the fund in question should pass through his hands for that purpose. Let the same be made by the clerk in whose hands the funds now are. The attorney and counsel of the assignee is entitled to be paid his taxable costs of suit, and a reasonable allowance for counsel fees. Such costs and counsel fees are to be paid from the proceeds of the real estate, or from the residue of the furniture fund remaining after paying the execution liens, and are not to diminish the fund for the payment of such executions.

*Dennis McMahon*, for the plaintiff.

*Henry E. Davies*, for Stewart.

*Alexander H. Dana*, for Miller & Conger.

*John J. Thomasson*, for Oechs & Co. and Batjer & Co.

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The Sarah Harris.

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## THE SARAH HARRIS.

Where supplies are furnished to a vessel in a foreign port, on the order of a person who is in the actual command and possession of her, as master, by a person who has no notice of any circumstances to raise a suspicion as to the authority of such master, a lien on the vessel is created, even as against a former owner of the vessel who claims that she was sold in fraud of his rights, and that the purchaser at such sale placed such master in command of her.

(Before HUNT, J., Eastern District of New York, August 16th, 1876.)

HUNT, J. On the 1st of December, 1870, the brig Sarah Harris sailed from Annapolis, Nova Scotia, on a voyage to Montevideo, South America. The brig was owned by John Harris and Richard Jones, who were residents of Annapolis aforesaid, and then living. On the 23d of January, 1871, the brig put into St. Thomas, in distress. Under judicial proceedings there had, the brig was condemned to be sold, was sold, and was purchased by Captain Fullmore and by Loran Cochran. If there was fraud in such proceedings, the libellant was not a party thereto, or cognizant of the same. Terence Cochran was put in command of the brig by such purchasers, and, at his request, as master, repairs were made upon her, and materials and supplies furnished to her, by the libellant, to the amount of \$770, in gold. A portion of this was paid, but a portion, amounting to \$340, has never been paid, and remains due to the libellant. Neither the said Fullmore, Terence Cochran, nor Loran Cochran were residents or citizens of St. Thomas, when the said materials and repairs were furnished, but were temporarily at St. Thomas.

The District Judge ordered judgment in favor of the libellant for the amount of his claim, with interest and costs. He held, that "the evidence presents all the facts necessary to give to the libellant a maritime lien upon the vessel proceeded against, for the repairs and supplies furnished by him." To this the appellants object, on the ground, that, at the time

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The Sarah Harris.

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of making the repairs, the Sarah Harris was not in a foreign port. The lien claimed can only arise when that fact exists. (*The Lottawanna*, 21 Wall., 558.)

The libel alleges, that the brig was "a vessel foreign to the port of St. Thomas, and standing in need of repairs and supplies," when the supplies, &c., were furnished. In answer, Harris alleges himself to be of Nova Scotia, and to be the true owner of the brig, and that no other person is the owner thereof. In the amended answer, Harris and Jones, describing themselves as of Nova Scotia, and as "owners and claimants of the brig Sarah Harris," make various denials and allegations, not touching this point. When an allegation is made upon the one side, and expressly conceded upon the other, it is to be assumed to be true.

It is argued, again, that the evidence shows that the sale made of the vessel, under judicial proceedings, resulted in a purchase of her by Fullmore and Cochran; that Terence Cochran was appointed her master by these purchasers; and that the supplies and repairs furnished were upon his order, as such master. It is argued, further, that this sale was fraudulent as to Harris and Jones, that Terence was not their agent or representative, and, hence, that the vessel is not bound for such supplies. This argument would be cogent in a contest between Fullmore and Cochran, on the one side, and Harris and Jones personally, on the other. It is unsound when applied to the present libellant. The proof shows, that, if there was fraud, he was neither party nor privy to it. If there was collusion between Jollymore, the master appointed by Harris and Jones, and the board of surveyors and purchasers at St. Thomas, the libellant neither participated in it, nor had knowledge of it. He made the repairs to the vessel, and furnished the supplies and materials, upon the requisition of the person in command of her, without knowledge that his authority was or could be questioned. He gave credit to the vessel. Whether the vessel is still owned by the claimants, as they insist, or whether she is owned by the purchasers at St. Thomas, she was, at the time in question, a vessel in a

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The Plymouth Rock.

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foreign port, and the supplies furnished create a lien upon her for the payment of their value. One who repairs a vessel, or furnishes materials, may do so upon the order of the person in actual command and possession of the vessel, if there are no circumstances creating a suspicion of his right. To require a master to prove the title to his vessel, and his authority to command her, as a condition of credit to a ship, would often involve great difficulty, and would add an unnecessary embarrassment to the law of maritime liens. (2 *Parsons on Shipping & Adm.*, pp. 7, 9, 329.) Several cases from East's Reports are cited to the contrary. Upon examination, I find them all to be cases where a personal claim was made against the alleged owner of the vessel. In that case, actual ownership must be established. They furnish no authority as to the existence of a lien on the vessel.

The judgment of the District Court must be affirmed.

*Goodrich & Wheeler*, for the libellant.

*Edward D. McCarthy*, for the claimants.

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THE PLYMOUTH ROCK.

A New Jersey corporation owned a steamboat which was enrolled in the port of New York. She ran as a passenger boat between the city of New York and Long Branch, in New Jersey, making several trips a day each way. Supplies of food were furnished to her in New York, on her credit, such supplies not being absolutely necessary for the passengers or crew, but being useful and convenient. Some of the food was consumed by the employees of the vessel, but the larger part was dispensed at a restaurant on board, to passengers, who paid for what they ordered: *Held*,

- (1.) The enrolment of the vessel at New York did not make her a domestic vessel there, but she was a vessel in a foreign port, while in New York, because her owner did not reside at New York;

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(2.) There was sufficient necessity for the supplies to furnish a basis for a lien on the vessel, and the fact that they were dispensed to passengers from a restaurant furnishes no ground for alleging that such necessity did not exist;

(3.) A lien on the vessel for such supplies was created.

(Before HUNT, J., Eastern District of New York, August 16th, 1876.)

HUNT, J. During the summer of the year 1873, the New Jersey Southern Railroad Company was the owner of the steamer Plymouth Rock. This vessel was run as a passenger boat between the city of New York and Long Branch, New Jersey, making several trips back and forth each day, and occupying an hour and a quarter in making a trip from dock to dock. The vessel was run by and in the interest of the said railroad company, which was an incorporation organized by and under the laws of the State of New Jersey, having its office and doing business in that State.

During the months of July, August and September, 1873, the libellant Fuller furnished to said vessel, and on its credit, at the city of New York, stores and supplies for food, consisting of butter, ham, and other articles of food, which were received and consumed on board the said steamer. The goods furnished were used partly in the support of the crew of said vessel and of the attendants thereon, and in part were dispensed from a restaurant on board said vessel, to the passengers thereon. Much the larger portion was used in the manner last mentioned. The sales from the restaurant were intended as sources of profit to the owners of the vessel, and the supplies were useful and convenient to the passengers and to the crew of said vessel. The trips were so short and the landings so frequent that such supplies were not absolutely necessary either to the passengers or the crew.

(1.) It is objected to the recovery, that the vessel was in her home port, and that there was, therefore, no lien for supplies furnished to her. The claimant insists that the character of the vessel, in this respect, is determined by her register and enrolment. Hence, there is produced a bill of sale from a former owner, containing a certificate of the enrolment of



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the vessel in the port of New York, and a new certificate of enrolment in that port, obtained by such new owner, the present claimant. Several authorities are produced upon either side, which I have duly considered. As I feel no hesitation in holding that the character of a vessel, as to its being a foreign or a domestic vessel, is determined by the place of residence of its owner, and not by the place of its enrolment, I do not deem it necessary to discuss the authorities. (1 *Parsons on Shipping & Adm.*, p. 43, note; *The Lulu*, 10 Wall., 198, 199.)

(2.) It is insisted, that these supplies were not necessary, and, hence, that there is no lien. Necessity is a relative term. By the uniform construction of the Courts, much latitude is given in this respect. What is necessary for a packet ship to Liverpool or Havre, carrying passengers who pay the highest price and expect a table to be liberally supplied, may not be necessary for a vessel carrying coal or lumber, with crews working at low wages and accustomed to plain fare. But, in each case, no doubt, a lien may exist for the articles supplied. (*The Lulu*, *supra*.)

I do not see that the fact of the dispensation of the supplies from a restaurant, *i. e.*, to individuals as called for, and to be paid for by such individuals, rather than that the passenger should be charged a passage price intended to include a charge for meals furnished, makes any difference. If a British steamer is about to sail for London with a crew of fifty men, and one hundred passengers, she must be provided with the means of feeding them. She must lay in the needed supplies in advance, ascertaining what will be needed. Whether she charges a passenger one hundred dollars and furnishes him a state room, and a seat at a general table well provided with food, or whether she charges him fifty dollars for his state room, and furnishes him meals to be paid for when and as he requires them, can be of no importance. No man can make the voyage without food, and, if it is supplied by the ship's company, the particular manner in which it is dispensed cannot be of importance. It certainly cannot be

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competent for the ship's owner to allege, that, for such reason, the articles purchased on its account are not necessary supplies.

(3.) It is strenuously urged, also, that the maritime lien for supplies furnished to a foreign vessel does not apply to a case like that before us, that of a ferry-boat between two points near at hand. If the rule does apply here, it must apply to the ferry-boats making their trips half-hourly between New York and Jersey City. These boats cross a space of perhaps a mile in width, and the boats are hourly at hand to respond to the liability imposed by the local law.

A lien is given for supplies furnished to a foreign vessel, which is denied in the case of a domestic vessel, for obvious reasons. In the latter case, the necessity for the lien does not exist, because the owner is understood to be present, and, by his personal credit and by giving liens himself on the vessel, he can procure everything to which his own credit or the value of his vessel properly entitles him. In the former case, the vessel is understood to be absent from her owner. She is a rover. She has reached a strange port, where her owner is unknown. Her voyage is unfinished, and, unless she can obtain supplies, she must lie where she is, a loss to every one. If her master has no funds in hand, the voyage must fail and his vessel must be a total loss, unless the vessel itself can furnish the means of extrication. These are the theories upon which the lien is given; and while, in practice, there have been modifications in many particulars, and while it is not intended to say that these are necessary conditions, they are, nevertheless, the foundation of the rule. (*The Grapeshot*, 9 Wall., 136, 141; *The Kalorama*, 10 Id., 212; *The Lulu*, Id., 197; *The Lottawanna*, 21 Id., 558.)

It is difficult to justify the application of this rule to a vessel that never goes to sea, and is never out of sight of her port of departure, and that is every hour of the day within the reach of the local process of the State in which the supplies are furnished. Were the question before me as an original one, I should be much inclined to take the view of

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The Clara.

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the claimant, and to hold that the lien did not exist in a case like the present. It appears, however, that the decision under review is, in this respect, in accordance with the holdings of the Courts of the Southern and Eastern Districts of New York. (*The Neversink*, 5 *Blatchf. C. C. R.*, 539, and 542, *note*.) Until the question shall be presented to a higher tribunal, it would not be becoming in me to hold otherwise, and I, therefore, overrule the objection under consideration. The furnishing of the supplies, and that they were upon the credit of the vessel, is reasonably established.

The judgment of the District Court is affirmed.

*Beebe, Wilcox & Hobbs*, for the libellant.

*Dudley Field*, for the claimant.

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THE CLARA.

A vessel, the N., was lying at anchor inside of the Delaware Breakwater, in the month of February, having gone there for safety from an approaching storm. Night came on, and it was very dark, and a large number of vessels came in, and a severe snow storm set in. The N. had no watch on deck. It was not proved that she had a light set. The C. came in for shelter from the storm, having proper lights, and a proper lookout, and, in anchoring, collided with and sank the N.: *Held*, that the N. was in fault in not having a watch on deck, and could not recover against the C.

(Before HUNT, J., Eastern District of New York, August 16th, 1876.)

HUNT, J. A collision occurred about five o'clock, A. M., of the 25th of February, 1874, inside the Delaware Breakwater, between the schooners Clara and Julia Newell, whereby the latter was sunk. The Newell, a small schooner of 78 tons

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The Clara.

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burden, on the afternoon of the 23d of February, anchored within the Breakwater for shelter from an approaching storm, and the Clara, being on a voyage from New York to Baltimore, foreseeing the approaching storm, bore away for and also put into the Breakwater for safety, where she arrived about five o'clock, A. M., of the 25th of February, and, while proceeding to a suitable and proper anchorage, collided with the Newell. There were then a large number of vessels in the Breakwater, and others were constantly arriving. At the time the Clara entered the Breakwater the night was cold and very dark, the moon having gone down several hours before. The Newell was lying without a watch on deck. The storm set in about the time the Clara came to anchor, and was a very severe snow storm. If the Newell had had a sufficient watch on deck, the accident might have been prevented. The Clara was well manned, and had proper lights and a proper lookout.

Whether the Newell had set and burning' the light required by law for a vessel at anchor, is a matter of considerable doubt. The evidence is conflicting, and it is quite difficult to determine what the truth is. I do not, however, pass upon this point, as I hold that the absence of an anchor watch on the Newell is fatal to her right of recovery. On this point there is no conflict of evidence. The mate of the Newell testifies, that, at the time of the collision, and for a considerable period before, no one was upon the deck of the Newell. It was his watch, and he kept it by going on deck occasionally, but remaining the most of the time in the cabin. At the time of the shouts and clamor preceding the collision, he was in the cabin, reading an almanac, and no one was on the deck. When he reached the deck, it was too late to avoid the catastrophe.

The place of refuge sought by each of these vessels was an artificial harbor off the coast of Delaware, constructed by the United States in aid of the coastwise commerce of the country. Sixty or seventy vessels had, at this time, put in there, to avoid an impending storm. It was an inclement

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The Clara.

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season of the year, the month of February. The night was dark and rough, and a severe snow storm soon came on. The Newell and the Clara had each a perfect right, as had all other vessels, to take advantage of this place of safety. It was, however, the duty of each to take the proper and customary measures for its own protection, and to avoid injury to others. As she came in, the Clara was bound to have a sufficient and careful lookout, in addition to the lights required by the statute. This, I think, she had. The Newell was bound to keep a head light, and was, also, bound to keep a watch upon her deck. The latter duty she entirely omitted. If her mate had been upon deck, keeping a careful lookout, he might have seen the Clara and her lights at such a distance, that, by hails and shouts, he could have warned her of the position of the Newell. If he could not have seen her lights, he might have heard the noise arising from lowering her sails and casting her anchors. It is testified, that the Clara could have heard a hail from the Newell at a distance of one hundred yards, and thus the accident might have been avoided. The omission was a want of proper vigilance, and it is by no means certain, that, if well kept, the watch would not have preserved both vessels in safety. (*The Sapphire*, 11 Wall., 170, 171; *The Indiana*, *Abbott's Adm. R.*, 330, 335; *The Mary T. Wilder*, *Taney's Dec.*, 567; *The Lydia*, 4 *Benedict*, 523.) The lookout of the Clara failed to discover the light of the Newell, if she had one, but the Newell might have seen her lights, or heard her noise, and, by shouts and hails, have given that notice which was needed. For this negligence I think she loses her right of recovery, and that the decree must be reversed and the libel dismissed.

*Scudder & Carter*, for the libellants.

*Owen & Gray*, for the claimants.

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The *Morrisania*.

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## THE MORRISANIA.

A vessel being properly and securely fastened to a pier in the East river, a steamboat passed by so near, and at such a rate of speed, that the swell she created threw the vessel against another one, and damaged the former: *Held*, that the steamboat was liable for the damage, because it was negligence in her to pass by so near, at such speed, the channel at the place being over one thousand feet wide, and open to her navigation, without obstruction, to that width.

(Before HUNT, J., Eastern District of New York, August 16th, 1876.)

HUNT, J. On the 1st and 2d days of October, 1874, the bark A. J. Pope was moored at the end of the wharf between 10th and 11th streets, Long Island City, Long Island. She was fastened to the bulkhead by a chain cable from her bow, and by a chain cable from her stern, and, also, by a heavy hawser forward and aft. South of the pier at which her bow headed lay another vessel, and, outside of the pier, lapping both the Pope and this other vessel, lay another vessel, called the *Hero*. On the day first named, the steamer *Morrisania*, a passenger ferry-boat plying between Harlem and New York City, on her way to Harlem, passed by this dock where the Pope was moored. On the 2d of October, while going in an opposite direction, she again passed by this dock. By her swell and suction on each of these occasions, the *Hero* and the Pope were thrown against each other, and the latter vessel sustained damage. The channel of the river at this place is over a thousand feet in width, and was open to the navigation of the *Morrisania*, without obstruction, to that width. The *Morrisania* passed within a short distance of the shore—some of the witnesses say fifteen feet, others thirty feet, others, again, put the distance at three or four hundred feet—and at a speed of twelve or fourteen miles an hour. It is difficult to fix the precise distance, but I hold it to have been much nearer to the wharf and the vessels than care and pru-

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The Morrisania.

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dence and good navigation on the part of the Morrisania justified. The bark Pope was properly and sufficiently secured to the pier and bulkhead, and there was no negligence in this respect.

In the case of *The Daniel Drew*, (*post*, p. 523), I discuss at length the general principles applicable to this case. A reference to the opinion in that case is sufficient, without here repeating the argument. With the general principles on which the argument of the claimant's counsel is based, I agree. But, here, their application is modified by the negligence of the Morrisania. After a careful examination of the evidence, I see no reason to find fault with the manner in which the Pope was fastened, or the material with which it was done. Neither do I see cause to doubt that the swell which did the injury was caused by the Morrisania. In the first answer, it was averred that the swell was caused by the Sylvan Glen, which preceded the Morrisania. This was clearly disproved. The second answer then attributed it to the steamer City of Boston. Of this averment there is no reasonable evidence. The speed of the steamer is not seriously disputed. As to how near she passed to the wharf, there is great contrariety of evidence, and it is a matter upon which honest men might reasonably differ. The libellants' witnesses put the distance at from ten feet to forty or fifty feet. Some witnesses say she came very near, without specifying how near. The witnesses for the claimant put her distance at several hundred feet. They say that no serious damage would have been done by her passing within one hundred feet. The damage, however, was done, and, in my opinion, the Morrisania passed within much less than a hundred feet, but certainly near enough to do the injury. Her undoubted right to the navigation of the river is subject to the restriction that it must be exercised in a reasonable and careful manner, and do no injury to others that care and prudence may avoid.

The judgment of the District Court is affirmed.

*Scudder & Carter*, for the libellants.

*D. & T. McMahon*, for the claimant.

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The Tillie.

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## THE TILLIE.

A canal-boat, wholly owned by a married woman, was injured in a collision with a steamtug. Her husband filed a libel *in rem*, in his own name, as owner, against the tug, to recover the damages sustained. At the time of the collision, and thereafter, the libellant and his wife resided in New York. On the trial, the wife testified as a witness for the libellant, and gave material evidence to sustain his claim for damages. It was shown that, in fact, the action was brought by and with the assent of the wife: *Held*, that the wife would be equitably estopped from bringing another suit, and that this suit could be maintained.

A tug with her captain on deck, and a man at her wheel, and no other lookout, held not to have had a proper lookout.

The absence of lights on a canal-boat held unimportant, when she could have been seen without lights on her, and when there was so much daylight that lights on her would not have afforded any aid in discovering her.

(Before HUNT, J., Eastern District of New York, August 16th, 1876.)

HUNT, J. On the evening of March 24th, 1873, the canal-boat John H. Stim, while being towed by the steamer U. S. Grant through Long Island Sound, in an easterly direction, was run into and injured by the steam propeller Tillie. At the time of such injury the boat John H. Stim was the exclusive property of Catharine Madden, wife of the libellant; and the libellant had no ownership or interest in said vessel at the time of said injury, or at the time of commencing this action. At such time, the libellant and his wife were, and ever since have been, residents of the State of New York. The said Catharine testified as a witness on the trial of the action, being called by her husband, and giving material evidence to sustain his claim for damages. The tow of the U. S. Grant consisted of nine boats, in three tiers, of three boats each, and the John H. Stim was the outside boat on the port side of the second tier. She was in that position when she was run into by the Tillie, and such collision occurred at about twenty minutes after six o'clock P. M., and when the light



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The Tillie.

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and the weather were such that the Stim and the other boats in the tow could have been seen by the officers of the Tillie, if a good lookout had been kept, and ought to have been seen by those in charge of her. The sun set at six o'clock and eleven minutes. The boats were not seen by the captain or lookout of the Tillie until that vessel was directly upon them. She ran between two of the boats in the stern tier, and against the boats in the second tier. The Tillie had no other lookouts than the man at the wheel, and the captain, who was in the fore part of the vessel, attending to the navigation of the vessel and giving orders for the same. The man at the wheel shifted the wheel and handled the engine, by the captain's orders. The pilot was in the cabin, drinking a cup of coffee, when the collision occurred. The Tillie was running at a speed of eight knots to the hour, and, when running at that speed, could have been brought to a dead standstill, by means of her reverse engines in less than her length.

I have, throughout the examination of this case, entertained great doubt of the right of the libellant to maintain this action. He brings the suit in his own name, alleging himself to be the owner of the boat injured, and claiming the damages as his own. He does not sue as husband for the use of his wife, as master for the use of the owner, or as agent or representative of any one. He appears in his own behalf only, and for his own benefit. The general rule cannot be doubted, that the owner of the claim presented must be the party to the suit for its recovery. If the chattel of A. is injured or destroyed, A. must bring the suit to recover the damages resulting; and an action by B. must necessarily result in a failure. This is the rule in all Courts. The fact that one is an agent of the owner, upon principle, can give him no more interest in the property, and no greater right to sue in his own name, as owner, for an injury to it, than if he were not an agent. By the laws of the State of New York, the bill of sale given in evidence established the title of this vessel in Catharine Madden, the wife of the libellant, and, by the same laws, she is entitled to bring an action in her own name for an injury to it.

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The Tillie.

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It is laid down, in the case of *The Una*, (5 *Benedict*, 198,) that the master of a vessel, whose owners are foreigners and absent from the country, may bring a suit in his own name, to recover the damages resulting from a collision. Whether justly or not, stress is laid upon the fact that the vessel and her owners were foreign and absent. In the case before us, this circumstance does not exist. The master and the owner are both residents of the State of New York.

Three cases have been decided in the Supreme Court of the United States, viz.: *Houseman v. The North Carolina*, (15 *Peters*, 40;) *Lawrence v. Minturn*, (17 *How.*, 100;) *McKinlay v. Morrish*, (21 *How.*, 343,) which are supposed to bear upon this point. In the latter two cases, the action was by the consignees, in their own name, and the question turned upon the interest of the consignees in the cargo, and it was held that this interest gave a right of action. In the case in *Peters*, the action of the agent was ratified by the power of attorney of the consignees, for whom he sued. The case of *The Commander in Chief*, (1 *Wall.*, 43,) holds, that the objection of want of proper parties, viz.: that the owners of the vessel were not the owners of the cargo, and cannot sustain the libel, cannot be taken for the first time, upon the argument in the Supreme Court. In the case of *The Ilos*, (*Swabey's Ad. R.*, 100,) where the damage had been pronounced for, in a suit by A., and, on reference to assess damages, it appeared that B.; not A., was the registered owner of the vessel injured, and A. claimed to be the beneficial owner, by a bill of sale not registered, Dr. Lushington ordered the case to proceed, and the money to be paid into the registry for the benefit of the party entitled to it. The objection was not taken on the trial, nor did the fact then or there appear. The order was made upon a motion to dismiss, arising subsequent to the decision upon the merits. The case scarcely affords ground to determine what would have been the opinion of the learned Judge, had the question arisen in the course of the trial and upon issue made. These authorities do not leave the question of the libellant's right to sue in this case in as good

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The Tillie.

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a position as might be desired. It is clear, in fact, however, that this action is brought by and with the assent of the wife, the real owner. I think it would not be tolerated in the real owner of a claim, that he should sit by and see another prosecute for its recovery, and even aid in such recovery by his own testimony in the suit, and then bring his own action to recover the same demand. He would be equitably estopped. I, therefore, proceed to consider the case upon its merits.

The evidence satisfies me that the collision occurred at about twenty minutes past six o'clock, on the 24th of March, 1873, at about ten minutes after sundown. The claimant's witnesses generally place this time at twenty minutes before seven. I think this is an error. It certainly is, unless the libellant's witnesses are guilty of the grossest perjury, in general not only, but in the specific facts to which they testify. The son of the captain of the Tillie, a witness for the claimant, testifies that he could see the land as they passed Fort Schuyler and Throgg's Neck, corroborating the numerous witnesses to that fact, on the part of the libellant. I have no doubt, that, if reasonable care had been exercised by those on board of the Tillie, the tow of boats could have been readily seen and avoided.

The Sound was a mile wide at this point, and the passage to the north of the Grant and her tow was unobstructed. There was no proper lookout on the Tillie, in form or in fact. The captain, who attends to the navigation of the vessel, is held not to be a proper lookout. A lookout should give his entire and undivided attention to ascertaining the vessels in front of, or near to, his own vessel, and reporting the same. The master, who is charged with the general care of a vessel, and gives his attention to that duty, is not, and cannot come, within this description. Neither is the man at the wheel—whose duty it is to keep the vessel on a prescribed course, to do which he must keep his eye on the compass, and receive and obey orders—a competent lookout, within this rule. Especially is this so, if, as in this case, he is charged with the duty of signalling to the engineer the directions necessary to

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The Tillie.

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be given to him. These two persons constituted the only lookout on the Tillie, as she proceeded up the Sound on the night in question. I think the lookout was not sufficient in law ; and, in fact, I think they did not exercise the care that the occasion required.

The testimony afforded by a log-book is usually entitled to much respect. The log-book of the Tillie, offered in evidence, is surrounded by so much doubt, and, to use a mild term, so many mistakes and discrepancies in relation to it are presented, and its internal appearance is so suspicious, that it must be entirely rejected.

The absence of lights on the canal-boat is not important. The evidence is quite satisfactory, that, if reasonable attention had been given, the boats in the tow could have been seen without lights on them ; and that such was the condition of the daylight, that lights would not have afforded any aid in discerning them. They were plainly visible from the Grant, at a distance of about six hundred feet ; and the boats of another tow were also visible at the distance of a mile, as was the land on each side ; and one witness was reading by the remaining daylight. Lighted lamps are not important for good or for evil, when the daylight remains so strong as in the present case. No claim is made, in the answer, that the lights of the Grant were defective or insufficient.

I find nothing in the evidence which would justify me in holding that the negligence of the Tillie and her officers is affected by any negligence of the Grant or the canal-boat injured.

The judgment of the District Court should be affirmed.

*Beebe, Wilcox & Hobbs*, for the libellant.

*James K. Hill*, for the claimant.

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The Virginia Rulon.

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## THE VIRGINIA RULON.

Under the statute of New York, (*Act of May 21st, 1875, Laws of New York, of 1875, p. 482.*) fixing the rates of wharfage to be paid by vessels, a vessel which makes fast to two distinct landing places must pay accordingly.

If she leaves a wharf without paying the wharfage due, she becomes liable, under said statute, to pay double the rates established by the statute.

The added amount is not a penalty, but is a wharfage rate, and the statute gives a lien on the vessel for the entire sum, including the added amount.

Such lien is enforceable in Admiralty against the vessel.

(Before HUNT, J., Eastern District of New York, August 16th, 1876.)

HUNT, J. On the 9th of October, 1875, the schooner Virginia Rulon made fast to and used the pier at 35th street, on the North River, New York, and continued to be made fast to the said pier until the 15th of October, when she left. The said vessel was, at the same time, and for the same time, made fast to the bulkhead adjoining to said pier, belonging to L. R. Roberts. She was loaded with lumber, and, in discharging her cargo, she made use both of said pier and said bulkhead, landing a part thereof over her bow on the bulkhead and the larger part over her side on the pier. She left said pier without paying, or tendering the payment of, wharfage. There was due for such wharfage, before she left the pier, the sum of \$26 40.

The statute of New York (*Act of May 21st, 1875, Laws of 1875, p. 482*) fixed the rate to be paid by a vessel "that uses or makes fast to any pier, wharf or bulkhead." This supposes that a vessel uses but one only of these conveniences for discharging her cargo. If she finds it for her interest to use more than one, she may do so, and must pay accordingly. A large vessel may find it much to her interest to use at the same time several piers or bulkheads. Indeed, her great size may compel her to cover the space of and use several at the same time.

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The Virginia Rulon.

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In this case, the Rulon not only made fast to two distinct landing places, but actually made use of both for unloading her cargo, discharging a part upon the pier and another part upon the bulkhead. If the labor usually done in ten days is compressed into five days, there seems nothing unreasonable in the suggestion, that a compensation for ten days' service should be paid. The same is true of the use of two wharves for five days instead of the use of one wharf for ten days. The claim of the owner both of the pier and of the bulkhead seems to be reasonable, and in accordance with the statute. I think the vessel is liable to both.

The statute further provides, that "every vessel that shall leave a wharf," &c., "without first paying the wharfage or dockage due thereon, after being demanded," "shall be liable to pay double the rates established by this Act." In this case the wharfage was demanded by the authorized agent of the libellants, and was not paid. Neither was it tendered to either of the parties claiming it. The "vessel" thereupon became and is "liable to pay double the rates established by this Act." Instead of being \$26 40, the wharfage rate thereupon became and was \$52 80.

It is objected that there is no lien for the wharfage, which can be enforced in this Court, and, especially, that there is no lien for the increased amount. By the statute already quoted, the "vessel" is specifically made liable for double the amount of the wharfage. In other words, this increased amount is made a lien or incumbrance upon the vessel. The declaration, that the vessel shall be liable for the amount, is an imposition of a lien for that purpose. The use of the word "lien" is not essential to the creation of a lien. When this vessel departed without paying the amount of \$26 40 then due, there became payable the sum of \$52 80, not as a penalty, but as wharfage rates. The "vessel" became liable to pay this sum, and it became a lien for wharfage under the statute.

The case of *The Lottarwanna*, (21 Wall., 558,) holds that

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The Columbia.

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liens of this character may be enforced in the Courts of Admiralty of the United States.

I think the judgment is right, and should be affirmed.

*Beebe, Wilcox & Hobbs*, for the libellants.

*D. & T. McMahon*, for the claimant.

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THE COLUMBIA.

A collision between a schooner and a steamer occurred in July, 1868, whereby the schooner and her cargo sank and were totally lost. The steamer carried the master and crew of the schooner to New York. The libel was verified in July, 1870, but was not filed until February, 1873. In January, 1872, a mortgage on the steamer and three other vessels was executed, payable two years after date. It did not appear that any part of it had been paid. No excuse was shown for the delay in bringing the suit: *Held*, that the collision claim must, on account of its staleness, be postponed to the mortgage.

(Before HUNT, J., Eastern District of New York, August 16th, 1876.)

HUNT, J. On the night of July 2d, 1868, the steamship Columbia ran into and sank the schooner Tabitha S. Greer, the said schooner with her cargo, and all the property on board, becoming an immediate and total loss. Said loss occurred without the fault of those on board of the schooner, but by the fault and negligence of those in charge of the steamship, to wit, in going at the speed of eight miles an hour in a dense fog, and in not hearing the fog-horn which was kept constantly sounded by the schooner. The libel was filed on the 4th of February, 1873. It purports to have been verified on the 15th of July, 1870. No reason is shown why it

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The Columbia.

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was not filed at an earlier day. On the 20th of January, 1872, the owners of the Columbia executed a mortgage for \$250,000 upon that and three other vessels, to Myers and others, which mortgage was, on the 22d of the same month, assigned to the respondent Butterfield, and is now held by him. The mortgage was payable in two years from its date, and there is no evidence that any part of the same has been paid. At the time of the collision, the Columbia was on her way to New York, and she immediately proceeded to that port and landed the captain of the Greer and his crew at the quarantine near New York. The schooner was on her way from a port on the North River to the Delaware Capes.

The libel was dismissed by the District Court on the ground that the claim made by it was stale. The collision occurred on the 2d of July, 1868. The libel was not filed until February 4th, 1873, nearly five years after the accident. There is no reason shown, in the evidence, for this delay, and no proof is given of the reason for the lapse of nearly three years between the time of verifying the libel and the time of filing it. The steamer was in New York immediately afterwards, as was the master of the schooner. The schooner sailed from Stony Point, North River, where, or near by, we may well suppose that her owners lived. There is no evidence that the steamer was not repeatedly and regularly in New York on her return trips, and the documents showing the transactions in New York and New Jersey afford ground to suppose that those interested in her lived in one or both of those States. These circumstances, unexplained, show an unwarranted delay in the proceedings to enforce the lien against the steamer arising out of the collision. In the mean time, before the libel was filed, the mortgage for \$250,000 was put upon four vessels, of which the Columbia was one, and was assigned to Butterfield. So far as we know, this debt exists to its full amount, and it must take precedence of the collision lien. If this debt has been collected from other sources, or if it should be collected from the other vessels in preference to the Columbia, it rests upon the party so alleging to produce



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The Daniel Drew.

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the evidence and to take the proper measures to adjust his equities. The present case does not present any evidence on the subject. All we here know is, that, as to Butterfield, the claim is stale, and must be postponed to his mortgage. (*The Nevada*, 2 *Sawyer*, 144; *The Dubuque*, 2 *Abbott's U. S. R.*, 20; *The Key City*, 14 *Wall.*, 653.)

As to the owners of the vessel, no defence of staleness is set up by them, nor do I see any reason why the claim should not be enforced as to them. They defend upon the merits only. The merits are against them, and, as to them, the claim is a good one, and should be allowed.

The decree of the District Court is affirmed, subject to the modifications above set forth. Let a decree be entered accordingly.

*Beebe, Wilcox & Hobbs*, for the libellants.

*John J. Allen*, for the mortgagee.

*Tracy & Catlin*, for the vessel.

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THE DANIEL DREW.

The Hudson River is a national highway, upon which steamtugs with their tows, and steam passenger boats, are equally at liberty to travel. Each class of boats may occupy the river with their boats of such size and construction as they may choose, and at the speed they may think fit, subject to the qualification, that the rights and interests of others are not unreasonably impaired. There is no absolute rule of law which limits the space a boat or its accompaniments may occupy upon a public river, or which prescribes the speed it may use, or the swell it may make, or how near it may come to another boat. It depends upon the reasonableness of the thing done, under all the circum-

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The Daniel Drew.

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stances of each particular case. It is not the rule, that, in the event of an injury from a swell, the boat causing the swell is at all events responsible.

The steamtug Ohio, with one boat at her side, and a tow of twenty boats, in five tiers, at her stern, was passed by the steam passenger boat Daniel Drew, in deep water and with a light wind, and, by the swell and motion caused by the Drew, and by the slacking of the tug's hawser, the boats in the tow were thrown against each other, and the libellant's boat was injured. It appeared that the speed was that usually kept up in passing a tow in deep water, that the swell made was not unusual, that neither those on the Ohio nor those on the Drew apprehended danger at the time from passing at the speed kept up, that the boats in the tow were not well arranged, and that the Drew exercised reasonable care and diligence: *Held*,

- (1.) That the Drew was not liable for an injury to one of the boats in the tow, from the collision mentioned;
- (2.) That the accident was in part, at least, attributable to the fact that the tiers of boats were towed by lines only six or eight feet in length, with nothing to prevent their coming together when operated upon by a force in the rear, and with a slackened hawser from the tug.

The English cases on the subject examined.

(Before HUNT, J., Eastern District of New York, September 5th, 1876.)

HUNT, J. On the 2d of June, 1873, the tug-boat Ohio left Albany on her voyage down the Hudson River to New York. She had lashed to her port side the canal-boat Billy Lape, and had, in addition, a tow of twenty canal-boats. These boats were in five tiers, of four boats in each tier. The port boat of the first tier was the George H. Price; the port boat of the second tier was the Marion; the port boat of the third tier was the Shoo Fly. The boat in the first tier next to the George H. Price was the Chick Henly; the boat in the second tier next to the Marion was the H. A. Peck. All of the boats were loaded. At about 11 o'clock of the next day this tow had reached a point known as Camp Crossover, six miles below Catskill, and ten miles below the city of Hudson. At this point there was a shallow in the river, on each side of which was a channel of nearly a thousand feet in width. It is unusual for passenger boats to take the west channel. The eastern is the main channel, and is usually taken by the boats going down the river. The Ohio had taken this eastern channel with her tow, and was about in the middle of the channel,

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heading a little to the southwest, and was making about three miles an hour. As the Ohio was near the lower end of the shallow or middle ground, the steamboat Daniel Drew, also going down the river, entered the eastern channel. The Drew was a daily passenger boat between Albany and New York, and had left Albany at 8.30 A. M. of the same morning, in the performance of one of her regular trips. She passed the Ohio and her tow in this passage, and, by the swell and suction caused by her, the libellant's boat, the Marion, was brought into collision with the boat George H. Price, which was in front of it, and the boat Shoo Fly, which was in the rear of it, and received damage. The usual speed of the Drew was seventeen miles to eighteen miles per hour, and she kept up that speed while passing the tow on this occasion. The Drew passed within one hundred feet of the tow, to the east of it, and within one hundred feet of the easterly shore of the channel, and as near to the east shore as was safe. No signal to slacken speed in passing was given to the Drew by the Ohio or any of its tow. The passage to the east of the Ohio was safer than a passage to the west of her in the same channel. It is not the custom of boats navigating the river to slacken their speed while passing a tow in this part of the river, nor at any point south of or below the city of Hudson. There were two hawsers from the Ohio, reaching to the outer boats of the first tier, one attached to the George H. Price, and the other to the canal-boat on the starboard side of the first tier. These hawsers were from 450 to 480 feet in length. The middle boats were fastened to the outer ones by breast lines and spring lines, and the tiers following to the tiers in front by spring lines. The length of lines between the different tiers was six to eight feet. As the Drew passed the Ohio, the lines by which the boat Billy Lape was fastened to the Ohio broke. The lines of some of the boats in the tow at the rear were also broken. Before this breaking of the lines, the Ohio had slowed for the purpose of easing her hawsers. The Drew was proceeding at her customary speed, which was not unusual for passenger boats, and not unreason-

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able, and made no unusual swell. She had no reason to apprehend danger to the Ohio or her tow in passing her, and received no intimations from the Ohio that danger would be incurred if she passed her on her appointed course, and at the speed she was using. The Ohio apprehended no danger, from the Drew's passing as she did. The water was deep at the point in question. The injury to the libellant's boat was caused by the coming together of the sterns and stems of the boats in line with each other, caused by the swell of the water and the suction made by the Drew, and the nearness to each other of the several tiers of boats. The forward swell of the Drew threw the Shoo Fly into the stern of the Marion, and the stem of the Marion into the stern of the Price, by which collisions the damage complained of was occasioned. The breaking of the lines of the Billy Lape, and her parting from the Ohio, had no material effect upon the collision of the boats in the hawser tiers. The tiers of boats were lashed too close together for safe navigation.

The District Judge held that the Drew was in fault, and gave judgment against her for the damage sustained by the libellant.

These several steamboats were engaged in a lawful occupation, upon a great public highway, and by the use of lawful means. The Hudson River is a national water-course, open to all who choose to use it. The owners of the Ohio had the right to navigate it with their steamboats and tows. The owners of the canal-boats had the right to be towed thereon by the steamboat. The Daniel Drew was engaged in an occupation equally legitimate. Her owners had the same right to the use of the river for the purpose of carrying passengers upon their vessels, that the Ohio and her tow had for their purposes. All had the right to its use, in the manner necessary for their lawful pursuits. The Ohio occupied a much greater width of the stream than did the Drew. She towed her boats in tiers of four boats in width, and other like boats often carry their entire tow of boats alongside of the steamer, occupying much more space than did the Ohio on the present

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occasion. So far as was necessary, and connecting it with the qualification that the interests of the general public are not to be impaired unreasonably, the owners of the Ohio properly exercised their own judgment as to the size, arrangement and management of their enterprise. The Drew, on the other hand, requiring little room upon the surface of the river, found speed in passage indispensable to the success of its business, necessarily causing more swell and agitation than is made by the slower passage of a tow-boat. There is no law which limits the space a boat may occupy, or which prescribes how fast it may go, or how much swell it may cause, or how near it may pass to another boat. The rule of permission or of restriction depends in each case upon the reasonableness of the thing done. A dull sailing tow may not occupy unreasonably the entire channel of the river, and thus impede its navigation by all other vessels. A leviathan may not rush through the water with a speed that will overwhelm in its surges all the craft ordinarily to be found upon the river. Nor is a large vessel, under all circumstances, absolutely liable for an injury caused by its swells to an inferior vessel. The waters are open to the use of all kinds of crafts, large as well as small, and, while the rights of the smaller are to be carefully guarded, they are not to be made a pretence for excluding, or preventing the practical use of, larger or different vessels. Sea going steamers move at a rapid rate of speed. They are large and bulky. They necessarily create much motion in the water. Vessels used in the bays and harbors, and the rivers near New York, for the carriage of passengers, are built for speed, and without speed their trade would soon come to an end. Their speed also creates much motion in the waters. Is there any rule of law which prescribes that these vessels shall absolutely be liable for injuries occasioned to smaller craft by a swell or motion caused by their passage through the water? Is there any greater or more stringent test of liability than that a large vessel shall use its large powers with care and diligence, and in the mode recognized

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by those accustomed to the business in which it is engaged as being prudent and proper?

To apply these suggestions to the present case. The Ohio and its tow were lawfully sailing down the Hudson River, at a speed of three miles an hour. The bulk or quantity to be transported, and not speed, is the consideration of her owners. The Drew comes on her passage in the same direction, at the rate of eighteen miles per hour. Speed is the consideration of her owners. If she cannot have this, her business is as effectually destroyed as if the river should be bridged or dammed. The rule of law would seem to be that she is entitled to pass the Ohio. She must, however, have the means and possess the skill to pass her, with knowledge of the waters and with care and prudence. Whatever the usage and practice of those engaged in such navigation adjudge to be necessary precautions, she must take. So, the Ohio and her owners must know that vessels like the Drew are engaged in rapid navigation, and that she must be passed by such vessels, as they overtake her. The towing vessels and the vessels towed must be so constructed and so managed as to meet the contingency of being passed by other vessels. If an overtaking and passing vessel, in prudent navigation, creates swell and suction, arrangements must be made that the boats in a tow shall not be injured thereby. If the swell and suction created by the passing vessel are those to be expected in the ordinary navigation of a rapid vessel, which is managed with prudence and equipped and constructed in a suitable manner, and if the passing vessel has no reason to apprehend that she will do an injury, and a tow is injured thereby, the passing vessel is not responsible. She has but exercised her lawful rights, and the loss must be borne by the injured party. The rule is essentially the same as if a collision had occurred. The vessel is to continue its course as before. The other vessel is to see to it that no collision occurs. But this is not an absolute rule of law. If the passing vessel shall appear to have performed all of its duty, in everything required by care, prudence, knowledge and management, and shall appear

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to have been thoroughly manned and equipped, but, by some occurrence beyond its control or impossible to foresee, a collision had occurred, the passing vessel is not responsible. So, a superior vessel is bound to great care and diligence, but is not an absolute insurer against injury to an inferior.

That the Drew was right in taking the eastern channel is established by the libellant's own witnesses. The captain and the pilot of the Ohio both testify that the eastern channel is the one usually taken, that it is the main channel, and that passage through the western channel is unusual. The same witnesses on the part of the libellant establish the fact that it was not the practice for passing boats to slacken their speed in deep water like that in this channel, nor at any point south of the city of Hudson. The weight of the evidence is, that the Drew passed as near the eastern shore as it was safe for her to go, and that there was, at least, as much space between the Drew and the tow as between the Drew and the shore. The position of the tow in the middle of the channel, with a slight westerly heading, indicated that a passage to the east of her would be safer than one on her westerly side. I do not, therefore, discover any fault in the Drew for taking the easterly channel or the easterly side of that channel.

The pilots and managers of the Ohio all saw the Drew approaching, and recognized her rate of speed. If they had supposed she was going too rapidly for their safety, a signal to slow up should have been given at once, and, we may suppose, would have been obeyed. Its absence furnishes strong ground to believe that the managers of the Ohio supposed, as did the managers of the Drew, that no change of speed was necessary.

A swell was no doubt created by the Drew, and this threw together the boats in the tow, as it struck them. The hawser line was some four hundred and fifty feet in length, while the length of lines between the different tiers was but six or eight feet. There was nothing to stay the Shoo Fly as she was washed against the Marion, or the Marion as she was washed against the Price. With boats prevented from being

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more than six or eight feet apart, and nothing to prevent their coming together, it would seem to be almost a necessary consequence that any swell or motion from the rear would precipitate them against each other. If the lines between these tiers had extended fifty or one hundred feet, there is nothing to show that there would have been any difficulty in the present case. I cannot but think that the accident was largely attributable to the different tiers of boats being tied so close to each other. It is quite likely that this compact arrangement enables the steamer the better to manage the tow in its forward motion, but it is defective in protecting it against a power moving from the rear. If struck by a stern wind or tide or swell, and the steamer slackens her hawser, the tow is exposed to this difficulty.

I am not justified in holding, upon the testimony of all the witnesses, that the swell made by the Drew was unusually large, or that it was dangerous in any other manner than as danger is necessarily incident to the swell from a passing vessel. The pilot of the Ohio says: "I don't think the swells from the Drew were unusual for a boat that came as close as that to us; the swell was not an unusual one for coming so close; the closer they come the more swell they throw on the boats." The captain gives the same evidence. One pilot and some of the captains of the canal-boats thought the swell was large. The result of the whole evidence seems to be, that the Drew, as she passed, created a swell, but that there was nothing unusual about it, or anything to excite the attention of those who managed her. The water was deep, the weather calm and pleasant, with a light wind and a light flood tide.

I have not been able to discover any fault in the equipment or the management of the Drew. She exercised her acknowledged rights in a careful, prudent, and in the accustomed manner. The injury to the boats arose either from the faulty manner in which the tow was made up, or the breaking of insufficient lines, or from the effect of a swell such as was ordinarily made by a boat like the Drew, and such as the Ohio knew she was accustomed to make. Against



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her speed or her swell the Ohio made no remonstrance. The officers of the Drew testify that they saw no reason to apprehend danger in passing as they did. The officers of the Ohio state, that, at the time, they apprehended no danger.

In his brief, the libellant's counsel insists, "that the swell and suction were caused by the claimants' boat. They were bound, at all events, to prevent it." This is stronger language than the authorities justify. The principle is much the same as that involved in *Railroad Co. v. Stinger*, (78 Penn. State Rep., 219,) where it was held as follows: "1. A railroad company, having a chartered right to propel their cars by steam, are not responsible for injuries resulting from the proper use of such agency; 2. Whether alarming a horse and causing an accident by a rapidly moving train, or sounding a whistle, will make the company liable for damages, depends upon whether it was from want of proper care in those in charge of the train; 3. What would be due care in running a train through a sparsely settled rural district might be negligence in approaching a large city; 4. A train was passing through a city on a railroad which had a number of short curves, so that persons could see the train but for a short distance; it was crossed by several streets and passed over a river on a drawbridge; the rule of the company required that the whistle should be sounded about a certain point, to warn the bridge-tender and persons about to cross at other streets: *Held*, the use of the whistle at that point in the ordinary manner was not negligence; 5. If the whistle had not been sounded at such point, and one had been injured by reason of the omission, it would have been negligence *per se*; 6. One driving an unbroken or vicious horse, or one easily frightened by a locomotive, along a public road running side by side with a railroad, does so at his own peril; the right of the company to move their trains on their road is as high as that of the individual to use the public road." See, also, *Favor v. Boston & Lowell R. R. Co.*, (114 Mass., 350.)

Some cases in the English Courts are supposed to bear upon the question. In the case of *The Batavier*, (*Spinks v.*

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*Ecc. & Adm. Rep.*, 378,) tried before Dr. Lushington and the Trinity Masters, the barge Ann, loaded with forty-nine tons of coal, was sunk in the Thames, on the afternoon of October 5th, 1853. The case states that the barge was sunk by the swell made by the steamer Batavier, both vessels being on their passage up the Thames. The Batavier passed the barge within one hundred and fifty feet, at the speed of nine or ten miles an hour. Her speed caused a swell which flowed over the barge and sank her. A speed exceeding six miles per hour was, by statute, prohibited at the place in question. The Court held and found: 1. That the barge had no fault or defect; 2. That the Batavier was in fault in not having seen the swell she made, and in not stopping in time to avoid the accident; that, if she had kept a proper lookout, she would have seen it; and that neither the swell nor the barge were in fact seen from the steamer; 3. That the owners of the Batavier were responsible. This case affords no light by which to decide a case where the vessel libelled was well equipped, kept a good lookout, took the ordinary channel, passed the other vessel at an accustomed rate of speed, and created no unusual or dangerous swell. The case of *The Batavier* was affirmed by the Privy Council, (9 *Moore's Privy Council Rep.*, 286.) The points were ruled as in the Court below: 1. That no blame or negligence was attributable to the barge; 2. That the steamer was in fault in her speed, and, "if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate; at all events she was bound to stop if it was necessary to do so, in order to prevent damage being done by the swell to the craft that were in the river." "She ought not to have made that swell in the river if she was aware that there was any vessel which might be damaged and put in jeopardy by her doing so;" 3. That an insufficient lookout was kept by the steamer. The principles sustained are those put forth by Dr. Lushington in the case as reported in Spinks.

The case of *Luxford v. Large*, (5 *Carr. & Payne*, 421,)

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was at *nisi prius* before Lord Denman. He charged the jury, that if the swell was occasioned by the improper speed of the defendant's vessel, and if the injury arose from the swell caused by such speed, the defendant was liable.

In *Smith v. Dobson*, (3 *Man. & G.*, 59,) the judgment was based upon the evidence that the defendant's barge was improperly and negligently navigated. The questions debated were chiefly upon the form of the verdict.

I see nothing in these cases in hostility to the principles hereinbefore announced. They do not countenance the idea that the superior vessel is necessarily and absolutely liable to the inferior, in the event of an injury from the swell of the former. They place the decision, in every instance, upon the question of negligence or improper management in the larger vessel. The principles of this opinion are in entire harmony with those laid down in *The Alleghany*, (9 *Wall.*, 522,) and in *The Syracuse*, (*Id.*, 672.) . The cases of *The Leo*, (3 *Benedict*, 569,) and *The C. H. Northam*, (7 *Id.*, 249,) I have carefully considered.

The decree of the District Court must be reversed, and a decree entered dismissing the libel.

*Beebe, Wilcox & Hobbs*, for the libellant.

*Cornelius Van Santvoord*, for the claimants.

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The United States v. Millard.

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## THE UNITED STATES vs. SAMUEL H. MILLARD.

An indictment under § 3397 of the Revised Statutes charged that the defendant "did buy, receive and have in his possession" cigars on which the tax to which they were liable had not been paid, the statute using the words "buys, receives or has in his possession:" *Held*, that the averment was divisible, and that a conviction could be had on proof of possession alone.

(Before BENEDICT, J., Southern District of New York, December 21st, 1875.)

THIS was an indictment, under § 3397 of the Revised Statutes, charging that the defendant "did buy, receive and have in his possession" cigars on which the tax to which they were liable had not been paid. On the trial, it was held, that the averment was divisible, and that a conviction could be had on proof of possession alone, the statute using the words "buys, receives or has in his possession."

*Benjamin B. Foster*, (Assistant District Attorney,) for the United States.

*Lucien Birdseye* and *Abram J. Dittenhoefer*, for the defendant.

# APPENDIX.

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## I.

PROCEEDINGS OF THE MEMBERS OF THE BAR IN THE CITY OF  
NEW YORK, ON THE DEATH OF THE HONORABLE LEWIS  
B. WOODRUFF, CIRCUIT JUDGE OF THE SECOND CIRCUIT.

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THE members of Bar in the city of New York met in the United States Circuit Court Room, on Wednesday, September 15th, 1875, in response to a call, of which the following is a copy :

"The members of the Bar are requested to meet in the United States Circuit Court Room, on Wednesday, the 15th inst., at 2 o'clock P. M., to give expression to their sense of the loss which the profession and the community have suffered in the death of the Honorable LEWIS B. WOODRUFF, Circuit Judge of the United States: William M. Evarts, George Gifford, John E. Burrill, Welcome R. Beebe, Henry E. Davies, Edward H. Owen, Joseph H. Choate, William Stanley, Edmund Randolph Robinson, George T. Curtis, Enoch L. Fancher, Erastus C. Benedict, Francis F. Marbury, George Bliss, Burr W. Griswold, Joseph S. Bosworth, Charles F. Sanford."

Hon. E. C. Benedict nominated as chairman of the meeting, Hon. Samuel Blatchford, Judge of the District Court of the United States for the Southern District of New York.

The following additional officers were elected, on motion of George Bliss: Vice-Presidents—Charles L. Benedict, Nathaniel Shipman, William J. Wallace, William D. Shipman, Murray Hoffman, Charles P. Daly, Noah Davis, Claudius L. Monell, Charles A.

Rapallo, Daniel P. Ingraham. Secretaries—John E. Burrill, Aaron J. Vanderpoel, Charles F. Sanford, Benjamin K. Phelps.

Joseph H. Choate, Esq., on behalf of the committee who called the meeting, offered the following resolutions :

The members of the Bar of New York have heard with deep and general sorrow of the death of Mr. Justice WOODRUFF. Identified with the administration of justice in this community for a period of forty years, his career was a continued progress of ever-increasing honor and power. Entering upon life with every advantage of education, and a mind enriched by the fruits of severe study, he attained, in early manhood, a conspicuous and responsible position, and thenceforth to the end pursued the practice of the law as a science and not as a trade, and did his part always to maintain and uphold it as a dignified and liberal profession. He scouted the low arts that would debase it, and abhorred and denounced every attempt or tendency to prostitute it to unworthy purposes. He had a conscience that never slept, and he followed its light through all the mazes of the law. His laborious and absorbing devotion to the cause of his client was proverbial, and this, with his ample learning and honest and manly character, made him always a leading figure among his brethren, an ornament of the profession, and a most valuable member of society.

But great as were his merits and virtues at the Bar, his rich and varied services to the State and Nation for twenty-five years, as an able and upright judge, are now his chief title to reverence and eulogy. His idea of what constitutes a judge was that old-fashioned standard which exacted of him the richest learning, the deepest study, the liveliest conscience, and absolute honesty, and he did his best to live up to it as nearly as human infirmity would permit. In whatever Court he sat, the authority of his decisions was powerful with his associates, and recognized by the bar. Serving successively in the Court of Common Pleas, the Superior Court, and the Court of Appeals, he did his full share to shape and frame the body of the law as it prevails among us to-day ; and his rich and growing experience, and the widely-extended reputation of his ability and learning, attracted to him a large measure of public attention ; so that when, upon the reorganization of the Circuit Court of the United States, a judge was to be found to exercise its vast powers and responsible duties in this great Circuit, the general sense of the profession and the community approved the judgment of the President in selecting Judge WOODRUFF as the proper man. How well the choice was justified the record of his judicial labors in that Court for the last six years will testify.

In bidding farewell at the grave to this eminent and useful lawyer and judge, the members of the Bar desire to put on record their high estimate of his mind and character ; to cherish the memory of his life and labors ; and to commend to one another and to those who follow them, his excellent example.

*Resolved*, That a committee of three be appointed by the chair to present these resolutions to the Circuit Court and the Court of Appeals, at the next session, and to ask, on behalf of the Bar, the entry thereof upon their minutes.

*Resolved*, That a copy of these resolutions be transmitted to the family of the deceased.

Hon. Joseph S. Bosworth then addressed the meeting, as follows :

The members of the Bar and of the Bench have met on this occasion to express their regard for the virtues, their admiration of the learning and official usefulness, and their sorrow for the loss, of one of the most worthy and eminent of their number.

It was my good fortune to have been personally acquainted with our deceased brother for many years, as a neighbor and friend, before he was elevated to the Bench ; to have been officially associated with him for the term of six years in active judicial service ; and to have maintained relations of friendship and intimacy with him since our official association was ended. In his own home he was hospitable and genial. He never seemed happier than when his house was filled with his relatives and friends ; and I do not believe that any one of them ever had any occasion, from one act or look of his, to suspect that he thought the visit was unnecessarily protracted, whatever may have been its length. The first office to which he was elected was that of Judge of the Court of Common Pleas of this city and county, a Court which has always had among its judges men of mark and decided ability. His associates in that Court were Mr. Justice Ingraham, an industrious, able, learned, and efficient judge, and the present scholarly and accomplished Chief Justice of that Court, Mr. Charles P. Daly. So worthily did he acquit himself in that position, that his associates expressed extreme regret that he should be disposed, as it drew to a close, to accept a nomination for the office of judge in another Court in this city, of co-ordinate jurisdiction. But he did accept such nomination, and was elected a Justice of the Superior Court of this city, in the fall of 1855, for the term of six years. His associates in that Court, naming them in the order in which they were elected, were Chief Justices Oakley and Duer, and Judges Bosworth, Hoffman, Pierrepont, White, Moncrief, Slosson, and Robertson. Of these nine associates of his, only three survive—Messrs. Hoffman, Pierrepont, and Bosworth. Of these three associates, only Judge Pierrepont, the present distinguished and efficient Attorney-General of the United States, was younger than Judge Woodruff. As a member of the Superior Court, no judge was more laborious or painstaking than Judge Woodruff. His powers of analysis were great, his logic was compact and convincing, and whether examining the papers on a motion, or the questions of law and of fact in a case tried before him, or a case on appeal, he gave to each the most careful attention and deliberate consideration. He was learned in the law, and although, occasionally, his opinions were disapproved by the Court of last resort (a fate which quite as often befell the opinions of each of his associates), they expressed, as all his opinions expressed, the honest conclusions of a well-instructed judgment.

He was eminently conscientious. His manner on the Bench has been criticised by some as being, at times, austere and harsh. I cannot resist the inclination to say one word upon this topic, although conscious of the delicate ground on which I tread. His feelings were kind and strong. He was sincere, earnest, and energetic in his work, whatever it might be and wherever to be performed. This sincerity, earnestness, and energy may, at times, have permeated and given color to his manner and action in disposing of questions arising at the trial, or

in *bona*, requiring prompt and summary decision. But this sincerity, earnestness and energy were, in his case, the marked qualities of a true man and of a fearless, able, and upright judge. They were not—I feel that I can say I know they were not—imbued with any feeling of unkindness to any suitor, his attorney or counsel. It would have been a most painful thought to him that he had ever given just occasion to be suspected of a conscious want of courtesy to any member of the profession in his intercourse with them. After 1861, he was actively engaged as a member of our profession in heavy and important causes, until, at the close of 1867, he was appointed Judge of the Court of Appeals. His opinions in that Court attest his industry, great ability, and extensive legal erudition. Of the manner in which he discharged the duties of the office which he held at the time of his death I cannot personally speak. My humble duties did not bring me into the Circuit Court of the United States for this Circuit while he presided as its judge. But the concurring testimony of all whose practice in that Court was extensive, is, that his industry, ability, and efficiency were as conspicuous there as in any of the other judicial positions which he had held and adorned.

It may be said of our deceased brother, that his life was useful, active, and distinguished. He was eminently useful to his family, to his relatives, to the Bench, to the Bar, and to the community at large. But his life and his example were not useful to the community merely as the efficient life and instructive example of a learned and laborious lawyer, and of an able, fearless, and upright judge. He believed, and acted on the belief, that humanity has interests and a destiny which do not terminate when the individual man has ceased to breathe. In the relations which he held, in consequence of this faith which was in him, he discharged all the duties growing out of them, worthily and well. He has gone to his rest, after a well spent life, beloved, respected, and honored by all who knew him, and by a goodly company who personally knew him not. The community in which he lived, which he served, and in which he died, will remember, with admiration and gratitude, his life of personal and official purity, and will appreciate the worth of his example, in the influence it may be hoped to exert over those who survive and shall succeed him in their personal, social, and official labors. All, whether relatives or friends, who now or shall hereafter think of our deceased brother, will contemplate a husband, father, citizen, lawyer, judge, and Christian gentleman, possessing a character of finely developed proportions, exercising wisely and well all his good and great qualities in the various relations of his distinguished career. All of us will feel, and will be made happier by the consoling assurance, that, in the world to which our deceased brother has gone, all is well with him now, and forever will be.

George Gifford, Esq., then addressed the meeting, as follows :

After the much that has been said, and well said, respecting the excellences of our departed judge, I will simply add, in a few words, my testimony to his having possessed in a high degree those characteristics which rendered him eminently qualified for the special duty of administering patent laws. My specialty being practice in patent cases, and his Court having original jurisdiction in patent suits, gave me special opportunity of becoming well acquainted with the ability which he manifested in dealing with such cases. I was in the



first patent cases which he heard after coming to the bench of the Circuit Court, and was one of the counsel who argued the last case he heard, which was commenced in the court-room and concluded at his residence, after he was unable to return to the court-room.

Judge WOODRUFF was richly endowed with properties of mind which were well calculated to insure that distinction in the administration of the patent laws which he so rapidly acquired. He had no prejudices either for or against patents. His sympathies neither ran too high nor too low for inventors. His mind was an even balance in which their merits were correctly weighed. He was free from bias in his deliberations respecting the products of inventive genius. He was patient to hear counsel, and willing to be instructed by the results of their researches. He never allowed his first impressions of a case, however strong or vivid, to lead him to rash conclusions, or to prevent needful examination to insure correctness. He was a learned judge in science and in law. He was an able, theoretical mechanic. He had a natural taste for mechanism, and a great power in discriminating between similarities and differences in machinery. His ability in analyzing mechanism and identifying what was essential therein, was unusually great. His power of drawing a line and discriminating between the essential parts and non-essential parts of an invention was unsurpassed.

Appreciating the danger of making mistakes in disposing of the different mechanical questions which often arise, and the disastrous consequences to parties which sometimes follow, it was his habit not to dispose of such questions hastily, but to carefully deliberate, and, sometimes, subject himself to great labor and fatigue to be sure he was right. The recorded decisions of Judge WOODRUFF, rendered in patent cases, are remarkable for their clearness and soundness, and are very properly much respected as reliable authority in all the Federal Courts. We were fortunate in having him called to the bench of the Court in which he presided at the time of his death, but we have been still more unfortunate in having him so soon removed from us.

Hon. Richard Goodman, of Lenox, Massachusetts, then addressed the meeting, as follows :

Having been notified only a moment or two ago, that I was expected to make any remarks on this occasion, of course I must confine myself almost entirely to such reminiscences of my connection with Judge WOODRUFF as occur to me at this time.

My acquaintance with Judge WOODRUFF commenced early in my professional career. After leaving the Law School at New Haven, I entered the office of George W. Strong, Esq., then one of the leading lawyers of this city ; but finding that he was mainly consulting counsel and had little practice in his office, I looked around for an office where I could learn the practice as it then existed. I was introduced by a fellow-student to Mr. WOODRUFF, not then a judge. I found him in a building on Broadway, I think, between Cedar and Pine streets, upstairs, occupied in part by the *Express* newspaper, and his office was on the second story, and below, of all things in contact with a lawyer, was a mock-auctioneer's establishment. My surprise was great that any lawyer could occupy an office with the continual sound of that hammer in his ears, and the din

of the street coming up through the large rotunda of the building. But Mr. Woodruff then displayed that great concentration of mind and devotedness to his studies that always controlled him, and he was not easily diverted by extraneous objects.\* We continued there during nearly all the period of my studentship with him, and from thence removed to 88 Cedar street. An examination at the Bar was then very different, as I understand, from the examination at the present time, for my learned brother Bosworth, with Mr. Ward Hunt, now one of the Justices of the Supreme Court of the United States, and the late President Fillmore, then examined the students, who had already passed through a seven years' course of study. So severe was that examination that, I think, only one in three of the class was at first admitted. On getting through the fire of that examination successfully, I returned to the city of New York, and entered into business for myself. About a year after that, Mr. George Wood—who had recently come from New Jersey, in which State and in the United States Courts he had an exalted reputation—was here retained in some very important suits, among others, eminently, the suit of *Ogden vs. Astor*, in which Mr. Daniel Lord, with whom our associate, Mr. Evarts, was then, or lately had been, a student, was counsel on the other side. When retained in those suits, Mr. Wood, looking for a man who could conduct them successfully and intelligently as attorney and junior counsel, selected Mr. Woodruff; and Mr. Woodruff, finding that those suits would occupy a great portion of the time which he would otherwise bestow upon his general practice, requested me to unite with him, and we formed a partnership about May, 1842. That connection continued with Mr. Woodruff until his elevation to the Bench in 1850, and with Mr. Wood until his decease. During that time Mr. Woodruff's business was extensive; and, although he was not then as well known to the Bar, or to the community, as afterwards, yet, by those with whom he associated he was especially prized; and it was the connection of Mr. Lord and himself with the case of *Ogden vs. Astor* which gave the former so high an estimate of Mr. Woodruff's abilities, and caused the promotion of Mr. Woodruff to the Bench, for I think that Mr. Lord was the active agent in having his name brought before the nominating convention.

Mr. Woodruff, during his professional career, especially during my connection with him, was that dangerous man, the man of one book. His library was select, but, until he became a judge, was not extensive, the main elements in it being "Gould's Lectures," in six volumes, copied by himself; and, whenever he had occasion to refer to authorities, those lectures were his principal assistance. But, although he was not a reading man, not a student, not a literary man, in

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\* During the utterance of these remarks I remembered an anecdote current among the Judge's relatives, but which I did not relate, as I could not vouch for its authenticity. But after the Bar meeting I was assured of its truth by a member of his family, and now, whilst correcting the stenographer's report, add it as an illustration of Judge Woodruff's absorption in the performance of his duties. Given, like all American judges, to the custom more honored in the breach than the observance, of writing long opinions, he became so engaged in that, to him, pleasurable occupation, one night, at his residence in Twenty-ninth street, as to become unaware how many of the small hours had passed, and, hearing a noise in the hall, rushed out of his library, expecting to confront a midnight robber, and astonished the housemaid, who had come down to her usual morning work, and was opening the front doors for the day. (R. G.)

the ordinary phrase, as expressed by us, either in law or in literature, yet there were few men so well posted in all the advanced theories on whatever subject might be circulating through the community. He was a troublesome man to discuss with, even when you were very well advanced in what you were talking about; and, whether it was a question of table-tipping or a question of science in any shape, or a question arising in the courts, or in literature, he always seemed to have thought much on the subject, to have great acquaintance with it, and to be well able to discuss it in all its elements.

In addition to that, Mr. WOODRUFF, from my earliest connection with him—and, as I have understood, long prior to that—appeared a man who always had his principles fixed, and never swerved from them. It is a very easy thing for a man to say he has fixed principles, but it is a very difficult thing, in the midst of business or temptations—and they come thick and fast upon the lawyer in active practice—it is a very difficult thing to carry out those principles on all occasions. When the late Edward Kellogg, of Brooklyn, (so well known for his original theories on banking and finance), at the time when there was an excessive speculation in real estate, first employed Mr. WOODRUFF, who was then just commencing practice and anxious for employment, he came to him and said, "I have a large real estate business; I want your assistance, but I don't think I can afford to pay you five dollars for every deed you draw." Mr. WOODRUFF's reply to him was—"Sir, I shall be very happy to have your business, but I cannot underbid my professional brethren. I understand the charge at the Bar is five dollars for every deed drawn, and whatever business of that kind you bring me, sir, that will be my charge." Mr. Kellogg afterwards became his devoted friend as well as client, and Mr. WOODRUFF received from him and his friends a large amount of business. On another occasion a high official from Washington came on, post haste, on Saturday, to employ Mr. WOODRUFF. I think he had some acquaintance with him during their collegiate course. He arrived on Saturday night. He said his business was urgent, and requested an interview with Mr. WOODRUFF on the succeeding Sunday. Mr. WOODRUFF courteously but firmly responded, "Sir, aside from my conscientious scruples on the subject, I devote that day to my family. I will attend to your business on Monday, but not to-morrow." The applicant, although at first rather rebuffed, received the rejection courteously, came on Monday, the business was done, and both parties, I believe, were entirely satisfied. And that was the kind of man that Judge WOODRUFF was from beginning to end—a man of firm, fixed principles, which he carried out without regard to cost or inconvenience to himself. And Mr. WOODRUFF, although, I am happy to say, a man who, of late years, has lived comfortably, somewhat in affluence—though certainly not arising from the salary received from his office during the last six years—yet, during his long course of professional life, he never seemed to regard the amount of his fees as anything compared to the business to be done, to the principles which he was to carry out, and to the success of his client. It made no difference to him whether his client was a poor man or a rich man; the only point was the success of the suit in which he was engaged. He spent as much time and engaged in as laborious devotion to his business in the little matters for which he received a limited amount, as he did upon those in which he received a larger

sum. And I know it was often a laughing remark of our associate, Mr. Wood, that Mr. Woodruff seemed to spend a great deal of time in his office elucidating subjects with clients who were boring him, which he (Mr. Wood) thought beneath Mr. Woodruff's attention.

It is said—and I have heard that remark before to-day—that Judge Woodruff, upon the Bench, was somewhat austere. I have been absent from the Bar so long that it has not come under my personal observation. With me there was never any austerity. During my long intercourse with him, he always treated me as a younger brother, and I found as kind a care in his house, as much fraternal affection from him, as much assistance whenever required, as I could have had from any devoted relative. But, if there was any austerity, it arose, in a great measure, if not entirely, from the earnestness of his nature. Within my recollection, there was a time when there was more cause than now, even, for apprehension on the part of lawyers, and austerity upon the part of judges, on account of young men coming to the Bar unprepared, leaping over the barrier without adequate examination, and threatening to fill our courts with ignorance. There have been two evils under which we have been suffering—the election of judges, and the admission of lawyers without proper examination; and I think we have found out that the latter is the greater, as without a learned Bar we cannot have honest and capable judges; and I have no doubt, that a man like Judge Woodruff, well versed in the law, armed with the full panoply of science, when on the Bench he met gentlemen coming before him, as they had been accustomed to come in some courts, for the purpose of having orders corrected, or papers prepared by the judge, would allow his impatience to exceed its bounds, and treat those suitors in a different light from what he would if they had presented their case as good lawyers should.

But to my knowledge, although Judge Woodruff may, in the discharge of his duties, have had an earnestness which perhaps looked to outsiders like austerity, yet beneath that there was always a great kindness of disposition; and those who, as Judge Bosworth has said, have shared the hospitality of his house and become cognizant of the under-current of his nature, have never failed to recognize the noble qualities of the man. At the time referred to by Judge Bosworth, Mr. Woodruff lived in Nineteenth street, before he moved to his late residence in Twenty-ninth street, where, united to a lady accomplished in all particulars, and with mental characteristics corresponding to his own, with an interesting family, with a large circle of friends, by marriage and by relationship, his house was always filled, he was the centre of an enlarged hospitality, and no man ever delighted to unbend, and to make all about him happy, more than our late associate. I look back to the time when I was in the habit of being in his house, sometimes for days at a time—I look back to those as the happiest days of my life passed out of my own family. And I am always willing to respond to and endorse any remarks such as have been made by our brother Bosworth, as to the geniality and hospitality of Judge Woodruff.

I have, perhaps, exceeded the bounds to which I ought to have been confined on this occasion. I only intended to say a few words here with reference to the gentleman who has been so long associated with us, so long known to the

whole community, who goes down to his rest as an upright judge. His career as a lawyer has been that of an able man, his career as an individual has been that of an honest man. I never, in all my reading, found but two men, and those living at a great distance from each other, as to time, who were willing to say, as they departed from this life, "I am content. I have enjoyed to the full all that life affords, and I am ready for another sphere. I have had enough." Judge Woodsruff would hardly have said that. He would rather have said that he would like to remain longer upon the Bench, to linger a little longer among his life associates. He would undoubtedly have liked to continue to dispense justice some years longer, so far as his health allowed him to do so, but at the same time, as we heard yesterday, he was a man of that character that when the time came that he saw his physical usefulness was gone, he was willing to give up and say—would not say, perhaps, but would feel—"I have done my part in this world as an honest man, as a good lawyer, as an upright judge, and I am not afraid to meet the greater Judge above."

Hon. William M. Evarts then addressed the meeting, as follows :

Our profession has not unfrequently been called together at the close of the vacation, before renewing our service in the Courts and to the community, to commemorate the loss of some distinguished lawyer or eminent judge. I am sure all of us can recall some suitable instances of this experience. Sometimes we have been criticised for assuming that there was matter of public interest in these occasions, and that our profession was distinguishable, in this regard, from other useful and honorable employments. Certainly no such observation can justly be made when the loss that we deplore is, even in a greater degree, the loss of the community, or when the lawyer whose career we celebrate was an eminent magistrate and judge. We cannot but feel that, though Judge Woodsruff's life, public and eminent as it was in the general esteem, was wholly occupied in professional service, at the Bar and on the Bench, yet among his contemporaries who have pursued the more active or brilliant paths of political employment, few can be said, either in fact or in the recognition of the community, to have been more distinctly or more usefully public servants than he.

His life was, indeed, useful, distinguished, prosperous, public, and in all that makes up the sum of human experience, whether personal, domestic, civic, or official, the full measure of prosperity in all marked his career. He gained no inconsiderable distinction at the Bar, and, had he adhered to its employments, we cannot doubt, he would have added to his powers and his repute as an advocate and a counsellor. Yet there is no doubt that his preferences, no doubt that the special aptitudes of his intellect and moral character, fitted him, more especially, for that highest and most honorable employment among men, known in civilized society, that of a judge. And how fortunate he was in the adequate preparation to assume, quite early in life, and to adhere, with but slight interruptions, to the end, to this course of judicial service! Well educated, brought here at an age suitable to bear the more strenuous labors of the Bar, he had the good fortune to be associated, thus early in his professional career, with a law-

yer than whom, I think I may safely say, our experience or our recollections do not recall any one possessing greater natural powers, or more completely disciplined in all the faculties of a great forensic reasoner—I mean Mr. George Wood. And brought early into such a relation, he was by that connection brought into forensic opposition to eminent lawyers older than himself, men on the same level with Mr. Wood. When he had attracted the approval of the great leaders in the profession, by the display of his qualities of eminent fitness for the public service on the Bench, he was, readily and by the consent of all, raised to that position. He first took a seat upon the Bench, then and now the most ancient and venerable in our judicial history, a Bench having the jurisdiction of the common law, and called by one of the favorite names of the common law, the “Court of Common Pleas.” His next judicial service was as a Judge of the most celebrated commercial Court, perhaps, that we have ever had in this country, the Superior Court of the city of New York. He there filled out, by a somewhat new experience of judicial service, his preparation for the highest station in the political service of the State, a place in the Court of Appeals. For it seemed as if he was so well fitted to serve us as a judge, that the chances or derangements of Courts or of politics were not long to deprive the community of his services. In the Court of Appeals, Judge Woodruff completed the round of judicial honors of the State, and by this varied experience was fully fitted for new judicial station. And when, by the defeat of his election to the Court of Appeals, he was thrown out of political place, and there came up a new Court of great importance and dignity—the Federal Circuit Judgeship—to be filled, by the general consent of the profession, he first occupied that eminent seat which he has just left. When he came to this new office, there was some feeling that his professional course had not made him specially familiar with the subject of Federal jurisprudence, with admiralty or patent law, and not much, if at all, with revenue law. But, sir, a man as well instructed in the common law as Judge Woodruff was, by his experience at the Bar and on the Bench, has the best and only necessary preparation for any and all the special departments of jurisprudence. Those who have had the most experience in the round of these special employments and special jurisdictions best understand that the common law is wider and deeper, more various and more exacting in its demands and its discipline, than any specialty can ever be. And he who has proved himself to possess the great powers of legal reason, and the great diversity for judicial faculty, that the common law exacts, may well encounter untried special jurisdictions without fear. But Judge Woodruff had some personal fitness for each of these specialties that every judge does not possess. He had a very thorough and profound knowledge of mathematics, which served him in the admiralty jurisdiction and in the patent jurisdiction. He had a very thorough knowledge of the philosophies of the natural sciences, and, if he had no particular or special qualities that should fit him for the other departments of jurisprudence, the force of his intellect was adequate for them all.

And, yet, all of us that have known Judge Woodruff at the Bar and on the Bench have felt, and all of us have exhibited this feeling to-day, that his moral qualities as a Judge fitly expanded and dignified a great judicial character.

That he sought distinction in the profession, and desired the promotions of the Bench, is an honor to him, as it would be to any one; but no man ever found him seeking elevation by any unworthy arts, or pursuing competition with his rivals by any secret or dubious means. When there was an office for which himself and his friends might justly think him suitable, he was ready to avow his disposition to accept the office, but not to run after it. To that limit of desire he always adhered. He regarded the career of human life, not as a game, but as the discharge of a duty, and the constant observance of duty through life as the highest and best success permitted to man. He relished thoroughly the full meaning of that noble proposition of the sacred Scriptures, "Now, if a man also strive for masteries, yet is he not crowned unless his strife be lawful."

The chair announced that he had received from a gentleman who was for several years an associate with Judge WOODRUFF, upon the Bench, who was unable to be present at the meeting, a communication which, under the circumstances of the case, and in view of Judge Shipman's former relations to Judge WOODRUFF, it had been deemed not improper should be read as a portion of the proceedings of the meeting, and be published as a part thereof.

The resolutions having been unanimously adopted, on motion of Robert D. Benedict, Esq., it was voted that the following letter of Hon. William D. Shipman be incorporated in the proceedings of the meeting :

NEW YORK, Sept. 14th, 1875.

HON. SAMUEL BLATCHFORD.—*Dear Sir:* Other and imperative engagements will prevent my being present at the meeting of the Bar of this city, to be held to-morrow, to do honor to the memory of the late Hon. LEWIS B. WOODRUFF, who, for nearly six years, has occupied the high position of United States Circuit Judge for the Second Circuit; but I am unwilling to allow the occasion to pass without a brief expression of my sense of the great loss which the Bar, the Bench, and the public have sustained by his death.

My personal acquaintance with Judge WOODRUFF commenced at the date of his appointment to the office which he last held, though I had long known him by reputation, through his career at the Bar, and on the Bench of the Common Pleas, the Superior Court, and the Court of Appeals. I knew he was an able lawyer, and an upright judge of large experience and unblemished character. But early in 1870 I was brought into close personal and official relations with him, which continued more than three years, and gave me constant opportunity of observing his character as a man and judge. I soon came to admire his zealous and conscientious devotion to his duties, the strength of his understanding, and the never-absent labor and energy with which he discharged the constantly pressing and heavy responsibilities of his great office. No toil or self-denial, however severe or exacting, for a moment deterred him from a thorough examination of every case which was submitted to his decision. He fully appreciated his position, and well understood the functions of a judge to be, to

administer justice according to settled rules. This was the guide to his judicial conduct, and in this he magnified his office. He had, indeed, a high sense of equity, and was always delighted when a sound conclusion was reached that would operate beneficially in the particular case before him. But he would never weaken established rules, nor unsettle the foundation of principles, in order to relieve the exceptional hardship of an isolated cause. He knew too well that both law and equity, to be of any value to an enlightened community, must be administered with steady uniformity, and to this end he spared neither time nor toil in the investigations which preceded his judgments, and in the preparation of his opinions which announced them. To this duty he brought a vigorous intellect, an enlightened reason, and a firm will. To say that he sometimes erred, is merely to pronounce him human.

Judge WOODRUFF was a man of massive and hardy nature. He was not one to reverence overmuch the lighter graces and ornamental accomplishments of a fine gentleman. But no man ever gave a higher regard or a heartier recognition to the solid virtues which constitute the essential riches of character. Within his strong and rugged frame beat a warm, gentle, and manly heart, whose sympathies were limited by no partisan or sectarian lines. He was open, frank, and generous. All who knew him will regret his departure, and mourn the loss of a just man, and an able and incorruptible magistrate.

Yours, very respectfully,

WM. D. SHIPMAN.

The chair appointed as the committee to present the resolutions to the Court of Appeals and the Circuit Court, Messrs. Henry E. Davies, George Bliss, and Joseph H. Choate.

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## II.

### THE CASE OF EDWARD LANGE.

EDWARD LANGE was indicted in the Circuit Court of the United States for the Southern District of New York, for stealing mail bags belonging to the Post Office Department of the United States, under section 290 of the Act of June 8th, 1872, (17 *U. S. Stat. at Large*, 320), which provided as follows: "Any person who shall steal, purloin, or embezzle, any mail bag, or other property in use by, or



belonging to, the Post Office Department, or who shall, for any lucre, gain or convenience, appropriate any such property to his own or any other than its proper use, or who shall, for any lucre or gain, convey away any such property, to the hindrance or detriment of the public service, every such person, his aiders, abettors and counsellors, shall, if the value of the property be twenty-five dollars, or more, be deemed guilty of felony, and, on conviction thereof, for every such offence, shall be imprisoned not exceeding three years; and, if the value of the property be less than twenty-five dollars, the party offending shall be imprisoned not more than one year, or be fined not less than ten nor more than two hundred dollars." The indictment contained twelve counts, and charged three different offences. Upon a trial, at the October Term, 1873, before the Honorable Charles L. Benedict and a jury, he was convicted. The verdict rendered was a general verdict of guilty. Thereupon, on November 3d, 1873, he was sentenced to be imprisoned for the term of one year, and to pay a fine of \$200. Thereafter, and at the same term, he procured a writ of *habeas corpus*, and, upon the return thereof to the Circuit Court, held by Judge Benedict, showed to the Court that \$200 had been deposited with the Assistant Treasurer of the United States, at the city of New York, to the credit of the Treasurer of the United States, as the fine imposed by such sentence, and claimed to be discharged from imprisonment upon the ground that the fine had been paid, and that he was, therefore, not liable to be imprisoned, inasmuch as the statute aforesaid, creating the offence, did not warrant a sentence of both fine and imprisonment. The Court held that the facts shown did not entitle the defendant to be released, and the writ was dismissed. After that, and on the 8th of November, 1873, at the same term, the Court, still held by Judge Benedict, directed that the sentence pronounced on the 3d day of November be vacated and set aside, and thereupon proceeded to pass judgment anew, and sentenced the defendant to be imprisoned for the term of one year. A second writ of *habeas corpus* was then applied for, and, a hearing being had before Judges Woodruff, Benedict and Blatchford, holding the Circuit Court, under section 2 of the Act of February 7th, 1873, (17 U. S. Stat. at Large, 422), the application for the writ was refused. Subsequently, a third writ of *habeas corpus* was issued by the Supreme Court of the United States, and the prisoner was released by that Court. The opinion of the Court, delivered by Mr. Justice Miller, is reported in 18 Wal-

lace, 163. Mr. Justice Clifford and Mr. Justice Strong dissented, and the dissenting opinion of Mr. Justice Clifford is reported at page 178. After the release of the defendant he brought a suit against Judge Benedict, in the Supreme Court of the State of New York, to recover damages for false imprisonment. The imprisonment set forth as the cause of action was that resulting from the sentence pronounced November 8th, 1873. In that suit, upon a demurrer to the complaint, the Special Term, (Van Brunt, J.,) overruled the demurrer. The General Term, in October, 1876, (Davis, Brady and Daniels, JJ.,) upon appeal, reversed the order of the Special Term, and dismissed the complaint. An appeal to the Court of Appeals was taken by the plaintiff.

The case was argued before the General Term by Benjamin F. Tracy, Esquire, on behalf of Judge Benedict, and the points taken by him were as follows :

I. The complaint shows the plaintiff charged with several offences against the United States, and his conviction of all the offences charged. The conviction is conceded to have been lawful. Upon such conviction the plaintiff became liable to the punishment imposed upon him by either or by both the sentences set forth in the complaint. There was, therefore, no false imprisonment.

(1.) The indictment set forth in the complaint, on its face, shows to this Court that the plaintiff was not put on trial for a single transaction. The indictment necessarily covers three separate and distinct offences, committed on different days and in respect to different lots of mail bags. These charges against the plaintiff were required by statute to be joined in one indictment. Section 1024 of the United States Revised Statutes provides as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and, if two or more indictments are found in such cases, the Court may order them to be consolidated." So far as is known, under this statute, it has been the constant practice, in Courts of the United States, to include several offences in a single indictment, and, upon a conviction, to inflict punishment for each offence.\* There can be no doubt that

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\* *United States v. Mills*, Massachusetts District. The case was tried before Shepley, Circuit Judge. The indictment contained sixty-nine counts. The defendant was convicted on seven counts, for seven different transactions. Sentence was passed imposing a fine of \$3,000 for each offence, in all, \$21,000. (See 15 *Int. Rev. Record*, 18.)

*United States v. Crane*, Vermont District, March, 1875, before Shipman, J. Two separate indictments were found by the grand jury, one for embezzlement, the other for making a false entry. The Court ordered the indictments to be consolidated. The defendant thereafter pleaded guilty, and was sentenced to pay \$1,000 and be imprisoned one year for one offence, and, for the

this statute is applicable to the plaintiff's case, and it was, therefore, charged in the indictment, that the defendant, at the various times stated in the several counts, stole and appropriated to his own use the mail bags described. Conceding that the same transaction is charged in different forms in the 1st, 3d, 5th, 8th, 10th and 12th counts, and conceding, also, that but one other offence or transaction is charged in the 2d, 4th, 6th and 11th counts, there can be no doubt that the 7th count charges an offence separate and distinct from that charged in any other count of the indictment. The 9th count was quashed. There were, then, three separate and distinct offences charged. The plaintiff was, therefore, convicted of at least three distinct and separate offences, and could be lawfully sentenced for them all. Otherwise, his conviction upon different offences required by statute to be joined, would work an acquittal of all but one.

(2.) No objection arises from the form of the verdict. The verdict was a general verdict of guilty. Such a verdict is a conviction upon every count in the indictment. It is not necessary to designate the counts in a verdict. A general verdict may always be rendered, which in law attaches to each count in the indictment. Such is the established effect of a general verdict of guilty; and this effect is the foundation of the rule, that, when some counts are bad, a general verdict of guilty is supported by one good count. In the indictment against the plaintiff all the counts, except the 9th, are good. If the verdict rendered against the plaintiff does not in law attach to each count in the indictment, to which of the counts is it to be attached, and by whom? Certainly this Court cannot attach the verdict to any particular count, or to any set of counts; nor can it say, as matter of law, that the plaintiff was not found guilty of every offence set forth in the indictment. It is settled law, in this State, that a general verdict of guilty, rendered upon an indictment containing several counts, convicts the accused upon every count in the indictment, (*The People v. Davis*, 56 N. Y., 100), and the defendant may be sentenced on all counts that are valid. (*The Commonwealth v. Birdsall*, 69 Penn., 482.)

other offence, to pay \$1,000 and be imprisoned one year after the expiration of the imprisonment first imposed.

*United States v. Eckel and others*, Southern District of New York, before Blatchford, J., January 25th, 1869. Indictment contained eight counts. Conviction on six counts. Sentence as follows: "Alvah Blaisdell, upon the first count of the indictment, to be imprisoned in the State prison at Sing Sing for the period of three years, and judgment and sentence suspended upon the 2d, 4th, 5th, 6th and 8th counts of the indictment, until after the full execution of this judgment."

*United States v. De Puy*, Southern District of New York, before Blatchford, J. The prisoner, in this case, being convicted of two offences on one indictment, was sentenced, for one offence, to be imprisoned one year and pay a fine, and, for another offence, to pay a fine and be imprisoned for six months, this imprisonment to commence on the termination of the imprisonment first imposed. Great efforts were made to secure from Judge Blatchford a release of the prisoner by *habeas corpus*, but the legality of the sentence was not questioned and the discharge was refused. (See 3 *Benedict*, 307.)

*United States v. Bowerman*, Maryland District, before Giles, J. An indictment against a deputy collector for embezzlement. There were five counts. The Court directed the jury to acquit on the 5th count. The verdict was guilty on the first count as to \$1,120; on the second count as to \$966 72; on the third count as to \$30; on the fourth count as to \$180; on the 5th count, not guilty. Sentence as follows: "Sentenced by the Court to pay a fine of \$2,846 72 and costs, and to be imprisoned in the jail of Baltimore city for the term of four years." (See 14 *Int. Rev. Record*, 124, 187.)

(3.) The sentence may be general and need not specify any particular count. It is for the Court that tried the cause to say, upon such a conviction, on how many counts of the indictment sentence shall be passed. When the sentence imposes a greater punishment than is prescribed by law for a single offence, it is presumed that the judge who tried the cause intended to sentence him on more than one count of the indictment. This precise question came before the Supreme Court of Massachusetts, in two different cases, at the same term. In *Carlton v. The Commonwealth*, (46 Mass., 5 Metcalf, 532,) there were two counts in the indictment, charging separate offences. The judgment sentenced the prisoner to one day's solitary imprisonment, and confinement afterwards at hard labor, for the term of five years, in the State prison. The offence charged in the first count was punishable "by imprisonment in the State prison not more than five years." It was assigned for error that "said judgment is excessive and illegal, in the matter of the one day's solitary imprisonment;" and it was contended that the judgment was erroneous because distinct offences ought not to be included in the same indictment, and because, if they could be so included, there should have been separate sentences. The Court held that two distinct offences could be included in the indictment, and affirmed the judgment, saying, (Shaw, C. J.): "We are of opinion that it is not necessary, in such cases, to award separate sentences, when they are so far alike that the whole of the judgment is but the sum of the several sentences to which the convict is liable." See, also, *Booth v. The Commonwealth*, (46 Mass., 5 Metcalf, 535; *United States v. Bowerman*, (cited in note, ante, p. 549.) "Judgment is continually passed upon a record containing many counts, without adverting to any count in particular." (*O'Connell's Case*, *Parke, Baron*, 11 *Cl. & Finn.*, 301.) "In criminal cases, where each count is, as it were, a separate indictment, one count not having been disposed of no more affects the proceedings with an error than if it were two indictments." (*Lathan v. The Queen*, 5 *Best & Smith*, 641.)

(4.) There is nothing in the language of the statute creating the offences in question, to prevent a conviction and sentence for separate and distinct offences committed on different days and with respect to different articles. If it be suggested that the statement added to the verdict, "and the value of the bags to be less than twenty-five dollars," confines the verdict to a single count, the question again arises—to which count is it confined? This statement, if it be considered a portion of the verdict, must, like the rest of the verdict, be presumed to refer to each charge, and attaches to each count. If it be considered as giving the aggregate value of all the mail bags taken, the result is the same for some parts, and it is wholly immaterial what part is to be deemed applicable to each count. But, the statement in respect to value forms no part of the verdict. The statute under which the plaintiff was indicted does not make the nature of the offence depend upon the value of the property taken. In a prosecution under this statute, value becomes important only when necessary to justify an imprisonment exceeding one year. Imprisonment for one year may be imposed without regard to the value of the property. In criminal cases, as distinguished from civil cases, the Court, and not the jury, determines the kind and the amount of the judgment; and the statement of value, in question, should be considered as a statement made simply for the information of the Court in passing sentence.

It is analogous to the statement that the accused is under 16 years of age, a fact which, in some cases, changes entirely the character of the punishment to be imposed.

(5.) The circumstance that the first sentence, which inflicted punishment for two offences, was vacated, and thereafter a sentence pronounced which inflicted the punishment prescribed for a single offence, does not tend to show that the plaintiff was not liable to the punishment imposed by the first sentence; while the fact that, upon the return of the first *habeas corpus*, the Court dismissed the writ before vacating the judgment, shows that the Court adjudged the first sentence to be lawful. Reasons for vacating the first sentence, in no way connected with the idea of illegality, can easily be suggested. Such action is not infrequent in inflicting punishments for crime.

(6.) There being three distinct offences charged in the indictment, and the punishment imposed by the sentences pronounced being lawful punishment for these offences, the presumption must be that these punishments were imposed for three offences proved; in which case, there was no false imprisonment.

(7.) The sentences pronounced upon the plaintiff are in no way affected by the time of rendition. Being pronounced at the same term, they were in law pronounced upon the same day. No statute of the United States fixes the time within which sentence is to be pronounced. Unquestionably, it would have been lawful to have detained the plaintiff in prison, after conviction, until the last day of term, and then to have sentenced him to one year's imprisonment for every offence for which he stood convicted.

The reasons above stated are sufficient to show that this case, as it stands before this Court, affords no room to assert the proposition that the second sentence of the prisoner was unlawful because "it was an attempt to enforce a judgment which the judge knew to have been satisfied." (*Van Brunt, J.*) None of the foregoing points were considered or passed on at the Special Term, Judge Van Brunt being of the opinion that it would not be decorous in him to declare an imprisonment lawful, from which the Supreme Court of the United States had released the prisoner upon *habeas corpus*. But good law is always decorous. This defendant is not bound by a judgment to which he was no party, nor can he be adjudged liable in this action upon ideas of decorum. Respectful consideration will, of course, be given to the opinion delivered by the Supreme Court upon discharging the plaintiff from imprisonment, but it does not conclude this Court, nor prevent due effect being given here to the point now made. Certainly, no breach of decorum can be charged upon this Court if it adopts, from the opinion of the Supreme Court in *Ex parte Lange*, the language used by that Court in regard to a decision of its own, (see Point VII, below,) found standing in the way of what the dissenting opinion designates as "a predetermined unsound judicial conclusion." (*Opinion of Clifford, J., Ex parte Lange*, 18 Wallace, 201.) This Court, therefore, may well say, in respect to the discharge of the plaintiff upon *habeas corpus*, that, "in general terms, without much consideration," the Supreme Court declared the plaintiff not liable to the punishment inflicted upon him. If it was intended to raise the question whether the plaintiff was not under conviction for several offences and liable to be punished for each offence, "that point was not presented so as to receive the atten-

tion of the Court, and certainly was not considered or decided." (*Opinion of the Court, Ex parte Lange*, 18 Wallace, 167.)

II. If the record can be held to show a conviction of only one offence, then the first sentence was a nullity; in which case, the second sentence was, of course, lawful.

(1.) It does not follow, says the Supreme Court of the United States, (*Opinion, Ex parte Lange*, p. 176), because the Court had jurisdiction of the person of the prisoner and of the offence, that these two facts make valid, however erroneous it may be, any judgment the Court may render in such case. On an indictment for libel, a judgment of death or confiscation of property would be void.

(2.) If the first sentence be deemed a sentence for a single offence, then it inflicts a punishment not authorized by law; and, whether void or voidable, the error affects equally each part of the sentence. How can it here be said, that that portion of the sentence which imposes the fine is valid, while that which inflicts the imprisonment is invalid? And how can it be left to the prisoner to determine for himself which part shall become valid and which remain invalid? The sentence is an entirety, and must stand or fall as a whole, unaffected by the subsequent action of the prisoner. It cannot be avoided in part and affirmed in part, and that by the prisoner instead of the Court.

III. This is an action for false imprisonment. The imprisonment complained of is from the 8th of November, 1873, to the 29th of January, 1874. This period is embraced within the term of imprisonment as fixed by both sentences. The first sentence, therefore, if not vacated, renders the imprisonment lawful.

The first sentence was vacated, or it was not. If, as the plaintiff contends, the first sentence was valid and beyond the power of the Court to vacate it, then that sentence stands as the sentence of the Circuit Court; and, whether justified by the conviction or not, it subjected the plaintiff to imprisonment for one year. Consequently, there could be no false imprisonment by reason of the second sentence, inasmuch as, during the period of his imprisonment, the plaintiff was within the scope of the first sentence as well, and subject thereto. In order to maintain this action, therefore, it must be conceded by the plaintiff that the first sentence was lawfully vacated.

IV. The first sentence was vacated. That sentence having been expunged from the record, the second sentence, when pronounced, was the only sentence. The record, therefore, shows to this Court a lawful conviction, and a sentence pronounced at the same term, imposing a punishment lawful for a single offence. It is by this record that the plaintiff's case must stand or fall, and the record shows the imprisonment complained of to have been lawful.

(1.) The first sentence, whether incomplete, or irregular, or void, was within the control of the Court during the entire term, and might be vacated or modified for any error or irregularity therein, and a new sentence be pronounced in conformity with the law. Writs of error, in criminal cases, are not allowed in the Courts of the United States, but such Courts are authorized, by statute, to grant new trials for reasons for which new trials have usually been granted in the Courts of law. The power to vacate a sentence is implied in the power to

grant a new trial, and is necessary to the proper administration of justice. Suppose gross misconduct on the part of the jury should be discovered the day after sentence—does the fact that sentence has been pronounced deprive the Court of the power to set aside or vacate the judgment, that it may grant a new trial? “It is, also, equally well settled, that the power of a Court over its judgments, to set aside, modify or annul, is unlimited during the entire term at which such judgments are rendered.” (*Union Trust Co. v. The Rockford R. R. Co.*, 6 Bissell, 197, *Blodgett and Drummond, JJ.*) “The Court certainly had full power to amend their records, and are the sole judges of the correctness of the entries made therein.” (*Sheppard v. Wilson*, 6 Howard, 277; see, also, *Doss v. Tyack*, 14 Howard, 812.) As no writ of error is allowed in the Courts of the United States, in criminal cases, to hold that such Courts have not the power to vacate a sentence would often deprive the accused of all power to vindicate his innocence.

(2.) The first sentence was imperfect and incomplete. It was necessary that it be perfected or vacated, and it was, therefore, not only competent for the Court, but incumbent upon it, to perfect or to vacate the sentence, as advised. It contained no directions to docket judgment for the fine, nor any order for execution, and there was no order to stand committed until the fine be paid. So far as the fine was concerned, the sentence was wholly ineffective, as it stood, for want of an “award of the proper process to carry into effect the sentence of the Court.” (*Kane v. People*, 8 Wend., 215.) Fines imposed by the Courts of the United States are to be docketed as judgments and collected by execution, as in civil cases. Payments may also be enforced by imprisonment, when so ordered by the Court.\* Here, no commitment was ever directed or issued.

V. The exercise of the power to vacate a sentence, in cases where the sentence is in part executed, does not violate the constitutional provision which forbids that one shall be twice punished for the same offence.

(1.) The application of the constitutional principle relied upon by the plaintiff was rejected by the Supreme Court in the plaintiff's case, where the Court declares, that it is not necessary to say, that, “when a party has had a fair trial before a competent Court and jury, and has been convicted, any excess of punishment deprives him of liberty or property without due course of law.” (18 Wall., 170.) It was also considered and rejected by the Court of Appeals of New York, in *Ratsky v. The People*, (29 N. Y., 124.) There, a sentence, passed upon a good conviction, and when in part executed, was set aside as unlawful, whereupon the power to pass a new sentence was questioned, and the constitutional protection was invoked. The power to sentence anew was upheld. Denio, Ch. J., says, (p. 135:) “The case is not within the constitutional provision which forbids a person being twice put in jeopardy for the same offence.

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\* “In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant, in like manner as judgments in civil cases are enforced: *Provided*, That, where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.” (*Act of June 1st, 1872*, 17 U. S. Stat. at Large, 198, sec. 13; U. S. Rev. Stat., sec. 1041.)

A person is said to be put in jeopardy only when he is a second time tried upon a criminal accusation; but, the term has no relation to the reversal of an erroneous judgment and pronouncing a legal one, pursuant to one legal conviction." So, in the case of *Foot v. The People*, (56 N. Y., 321,) where the Court below pronounced a sentence for a fine and ninety days' imprisonment, which, on appeal, was declared illegal, the Court of Appeals directed a new punishment to be imposed. In *Harris v. The People*, (59 N. Y., 599,) the defendant was convicted upon an indictment supposed to charge burglary in the second degree, and was sentenced to be imprisoned in the State prison, at hard labor, for the term of seven years and six months. It was held by the Court of Appeals, that the charge in the indictment was burglary in the third degree, and, consequently, that the punishment imposed was greater than that fixed by law for the offence charged. The Court thereupon affirmed the conviction and remanded the case to the Court below, with directions that the proper sentence be imposed.

(2.) No sound distinction can be made between the plaintiff's case and other cases of sentences partly executed, by declaring that the payment of the fine expiated his crime, because it was a suffering of "one of the alternative punishments to which alone the law subjected him." There is no such thing as an "alternative punishment." The statute makes none, and this sentence made none. The conviction of the plaintiff rendered him subject to such punishment as should be fixed by the Court. The statute creating the offence does not fix the punishment, much less an "alternative punishment;" nor does it declare that suffering a fine shall expiate this crime. The statute simply limits the power of the Court to certain kinds of punishments and within certain bounds as to extent. What would expiate the crime, in this case, rested in the conscience of the Court, and is only shown by the sentence of the Court in the case. The only punishment to which the plaintiff ever became subject, must, therefore, be found in the sentences pronounced upon him; and the punishments there imposed he has never suffered.

(3.) A sentence is a judgment of the Court, but the judgment in a criminal case differs from the judgment in a civil case, in that it must contain a determination in respect to the kind as well as the amount of punishment, made not by the jury, nor by the convict, but by the Court. It sounds strange to say that, when a Court, in pronouncing sentence, leaves unperformed the duty imposed upon it by the statute, of selecting between two kinds of punishments, then the convict may determine that question himself, and, by electing to be punished by fine, deprive the Court of all power to proceed further in the premises. The picture of a person whipped in pursuance of an erroneous sentence, has been alluded to with feeling, to show the necessity for a restriction of the power of Courts. But there must be power somewhere. The Court of Appeals has power, by statute, in case of reversal, to direct as to the sentence to be imposed, and whipping might appear in a sentence so directed. Prisoners convicted of crime may escape just punishment, by means of the writ of *habeas corpus*. But such suggestions afford slim reason for an abrogation of the statute, in the one case, or the denial of the power to discharge upon *habeas corpus*, in the other.

VI. The proposition that the second sentence imposed upon the plaintiff



was void, is made to depend upon the fact that the fine which formed a part of the first sentence had been paid. Payment of the fine has, it is said, exiated the crime. But, the fine was never paid.

This appears by the complaint; and it was also apparent at the passing of the second sentence. The facts relied on to show payment of the fine are set forth in the complaint. They show, on the contrary, that no legal payment of the fine was ever made. The facts stated are as follows: The first sentence was on November 3d. On November 4th, two hundred dollars was handed to the clerk, and retained by him until November 7th, when it was deposited with the Assistant Treasurer, "to the credit of the Treasurer of the United States;" and, on the same day, the plaintiff obtained the first writ of *habeas corpus*; returnable November 8th, upon the return of which writ, the deposit made the day previous with the assistant treasurer was proved on the part of the petitioner, as ground for his discharge.

(1.) The defendant was in the custody of the marshal. In order to pay the fine he must either pay the money to the marshal, directly, or obtain leave to pay the money into Court, and, upon such payment, obtain an order of the Court directed to the marshal, authorizing his release. The plaintiff pursued neither of these courses, but caused \$200 to be deposited with the Assistant Treasurer, to the credit of the Treasurer of the United States. It is true, that the clerk gave a receipt stating that the money was in the registry of the Court on November 4th, but the receipt of November 7th shows that the money remained on that day undeposited in the registry. It was never deposited to the credit of the Court, as required by law,\* but, on November 7th, was still subject to the control of the plaintiff who, on that day, caused it to be deposited with the Assistant Treasurer. The clerk had no authority so to deposit it in behalf of the Court. Such a deposit was, indeed, contrary to law; and the clerk, in making it, must be deemed to have acted as the agent of the plaintiff. The plaintiff, in his application for discharge on the first *habeas corpus*, made such deposit to appear, and thus shows that he relied on that deposit as his payment of the fine. The records of the Circuit Court, in the case of the plaintiff,† show, also, to this Court that no money was ever paid into Court by the plaintiff.

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\* "Section 1. That all moneys in the registry of any Court of the United States, or in the hands or under the control of any officer of such Court, which were received in any cause pending or adjudicated in such Court, shall, within thirty days after the passage of this Act, be deposited with the Treasurer, an Assistant Treasurer, or a designated depository, of the United States, in the name and to the credit of such Court. And all such moneys which are hereafter paid into such Courts, or received by the officers thereof, shall be forthwith deposited in like manner: *Provided*, that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties, under the direction of the Court. Section 2. That no money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said Courts, respectively, in term or in vacation, to be signed by such judge or judges and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn." (*Act of March 24th, 1871, 17 U. S. Stat., at Large, 1, secs. 1, 2; U. S. Rev. Stat., secs. 995, 996.*)

† "THE UNITED STATES }  
 vs. } For stealing and embezzling mail bags.  
 EDWARD LANGE }

1873.

Oct. 7. Filed bill of indictment.

" 8. Arraigned. Plea—Not guilty.

(2.) The \$200 was never intended to be paid into Court. On the contrary, it was deposited in Wall street, without the knowledge of the Court, in order to place it beyond the reach of the Court. If this money had been paid into Court, by the rules and by statute it would have been deposited in the Central National Bank, in the name and to the credit of the Court, to be drawn therefrom only upon a check showing upon its face the order of the Court so to draw it, and bearing the signature of the judge.\* If so paid, it would have been within the power of the Court to direct its return, by the clerk, to the person from whom he received it. It was not so paid, but was deposited to the credit of the Treasurer of the United States, in order to prevent the possibility of a direction to return it.

(3.) Money cannot be paid into Court without leave of the Court. No permission or direction to pay this money into Court was ever given, and none is averred. The clerk is but the amanuensis of the Court. He acts only by rule or direction of the Court, and he cannot bind the Court except as directed. A Court is not, at the option of any one, to be made responsible for the custody and disposition of money, simply by the fact that a clerk may be willing to receive it. "The clerk had no right to receive the money without a rule of the Court." (*Baker v. Hunt*, 1 Wend., 108.) The case is not that of an ordinary judgment regularly entered and an execution issued directing money to be made and returned to the Court.

(4.) The deposit of the money with the Assistant Treasurer cannot be relied upon as showing a payment of the fine to the United States. A payment of money, to be effective as a payment to the United States, must be made in the mode required by law. The delivery of money to the President, the Secretary of the Treasury, or the Treasurer of the United States, amounts to nothing, un-

Oct. 15. Motion to quash eighth, ninth, and eleventh counts of indictment. Ninth count quashed.  
Other counts stand.  
Trial commenced.

" 23. Trial concluded. Verdict—Guilty; and the value of the property to be less than \$35.  
Nov. 8. The prisoner, Edward Lange, is sentenced to one year's imprisonment, and to pay a fine of \$200.

" 7. Filed petition for *habeas corpus*.

" 7. Issued writ of *habeas corpus*.

" 8. Writ discharged.

" 8. Sentence pronounced Nov. 3d, 1878, vacated and set aside, and the prisoner sentenced to one year's imprisonment."

\* "At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court rooms in the city of New York, on Monday, the fifth day of June, in the year of our Lord one thousand eight hundred and seventy-one: Present—The Hon. Lewis B. Woodruff, Circuit Judge. In the matter of the deposit of moneys in the registry of the Court. In obedience to an Act of Congress entitled 'An Act relating to moneys paid into the Courts of the United States, approved March 24th, 1871,' it is ordered, that all moneys in the registry of this Court, or in the hands or under the control of any officer of this Court, which were received in any cause pending or adjudicated in this Court, be forthwith deposited in the Central National Bank of the city of New York, a designated depository of the United States, in the name and to the credit of this Court; and that all such moneys, which shall hereafter be paid into this Court, or received by the officers thereof, shall be forthwith deposited in like manner: *Provided*, That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of this Court."

less authorized by some statute. The fine in question was imposed for the violation of a postal law. By statute, the money belonged to the Post Office Department, as part of the postal revenue, and was to be deposited "for the use of the Post Office Department." (*U. S. Rev. Stat.*, § 4059.)\* In order to effect a payment to the United States of the fine in question, the money must go to the Postmaster General, to be deposited, under the direction of the Postmaster General, in the Treasury of the United States "to the use of the Post Office Department." When so deposited it would form part of account No. 7, "Fines and Penalties," (*U. S. Rev. Stat.*, § 4049,) and be available to the Post Office Department as a part of the postal revenue; otherwise, not. Had it been paid into Court, it would have been accounted for to the Post Office Department. It would have been deposited in the Central National Bank, in the name and to the credit of the Court, whence it would have been drawn under the order of the Court for payment to the Postmaster General, or, under his direction, into the Treasury, to the credit of the Post Office Department. What the plaintiff did was, to deposit two hundred dollars with the Assistant Treasurer, to the credit of the Treasurer of the United States. So deposited, the money can never reach the Post Office Department. Like "conscience money," it passed to the credit of the Treasurer of the United States, but it balanced no account and discharged no debt.

(5.) A sentence of the character of the first sentence passed upon the plaintiff, when made perfect, would assume the form of a judgment against the plaintiff for two hundred dollars, to be collected by the marshal upon execution; and the money, when received by the marshal, would be returned with the execution to the Court, to be disposed of by the Court in the manner before stated. The payment made by the plaintiff must, therefore, be deemed a voluntary payment. It was not made in pursuance of the sentence, and had no effect. The case, therefore, in every aspect, shows that the plaintiff has never expiated the crimes of which he stands convicted.

VII. So far as the liability of the defendant is concerned, the legality of his acts must be determined by the law as it then stood declared. According to that law, as declared by the Supreme Court of the United States, the legality of the second sentence would not be affected by the fact that a previous valid sentence, under which the accused had suffered punishment, had been made and set aside.

In *Basset v. United States*, (9 *Wallace*, 88.) it was decided, that it is competent for a Court, for good cause, to set aside, at the same term at which it was rendered, a judgment of conviction, though the defendant had entered upon the imprisonment ordered by the sentence. The same Court that discharged Lange on *habeas corpus*, in 1874, declared, in *Basset's* case, in 1869, that "this control

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\* "Unclaimed money in dead letters for which no owner can be found; all money taken from the mail by robbery, theft, or otherwise, which may come into the hands of any agent or employee of the United States, or any person whatever; all fines and penalties imposed for any violation of the postal laws, except such part as may by law belong to the informer or party prosecuting for the same; and all money derived from the sale of waste paper or other public property of the Post Office Department, shall be deposited in the Treasury, under the direction of the Postmaster General, as part of the postal revenue." (*Act of June 8th, 1872, 17 U. S. Stat. at Large*, 290, sec. 42; *U. S. Revised Stat.* sec. 4050.)

of the Court over its own judgment, during the term, is of every day practice." This language was used by the Supreme Court, in a case where, in execution of the sentence, the defendant was taken to prison and imprisoned several days, and then, on *habeas corpus*, issued on motion of the District Attorney, brought from the prison into Court, and then, likewise on motion of the District Attorney, the judgment was vacated and set aside. The defendant then withdrew his plea of guilty and gave a recognizance for his appearance for trial at a future term of the Court. Failing to appear for trial in pursuance of his recognizance, an action was brought against the sureties upon the bond. To this action the sureties answered, in substance, that, Basset having been once tried, convicted, and sentenced to imprisonment on the indictment, and having been taken in execution of such sentence and imprisoned, such imprisonment was an expiation of the offence, and that the action of the Court in holding him to bail to again answer upon the same indictment was in excess of the power of the Court, and was illegal and void. This case is directly in point, and is so conceded to be by the Supreme Court in *Ex parte Lange*. It furnished, then, the law binding upon the Circuit Court of the United States at the time Lange was sentenced. It is, indeed, now said by the Supreme Court, that the decision in Basset's case was made "in general terms, without much consideration, for no counsel appeared for the sureties," and that, for that reason, it is now to be disregarded. But, how could the defendant know that a case which the Supreme Court of the United States had decided and caused to be reported as an authority, had not received the attention of the Court, and that the Court had not considered what it had decided? He was bound to take the law as he found it declared; and, in sentencing Lange, the Circuit Court exercised precisely the same power exercised in Basset's case, and approved by the Supreme Court. What was lawful for the Court to do in Basset's case, was lawful for the Court to do in the plaintiff's case. It is, indeed, true, that what in Basset's case was declared to be lawful, has since, in Lange's case, been declared unlawful. But, the defendant is to be judged by the law in force at the time he acted. For the future, the later decision may furnish the rule in Courts of the United States, unless, on some other day, the Supreme Court should say that, having been decided without much consideration, for no counsel appeared for the judge, it is to be disregarded.

It has now been shown, that neither the first sentence, nor the second sentence, nor both together, imposed upon the plaintiff a greater punishment than the law allowed. It has also been shown, that the first sentence was lawfully vacated, and that the record shows but a single sentence, imposing lawful punishment for a single offence. It has also been shown, that, by the law as it was at the time, and as it now is, except as modified by the decision in *Ex parte Lange*, the first sentence having been set aside on objection taken by the accused, no previous payment of the fine, if made, would deprive the Court of power to proceed in the cause, and to sentence anew. It has also been shown, that the fine was never paid. It is submitted, that, under the circumstances, the defendant is entitled to a determination of these questions at the hands of this Court, notwithstanding it be plain that, for other reasons, the action cannot be maintained.

VIII. The act of the defendant, in pronouncing the judgment of the Circuit

Court of the United States, upon the conviction of the plaintiff then standing on the records of the Court, was a judicial act, and affords no right of action against the judge who happened to be holding the Court. Neither malice nor corruption is here charged or suggested.

(1.) Suits have frequently been brought against judges, and, whether maintainable or not, will continue to be brought from motives more or less creditable to the promoters thereof. They do not call for any stretching of the law in order to uphold them. Says Hale, C. J. : " I speak my mind plainly. *Habeas corpus*, although it doth make void the judgment, it doth not make the awarding of the process void to that purpose; and the matter was done in a course of justice. They will have but a cold business of it." (*Bushnell's Case*, 1 *Mod.*, 119.)

(2.) As early as in the reign of Charles II, it was held by the Court of King's Bench, that an action will not lie against a magistrate for false imprisonment in consequence of acts done by him in the character of a judge. That rule has never been departed from by the English Courts. Hawkins says, (*Book 1, chap. 72, sec. 6*): " The law has freed the judges of all Courts of record from all prosecutions whatsoever, except in the Parliament, for anything done by them openly in such Courts, as judges. For, the authority of a government cannot be maintained unless the greatest credit be given to those who are so highly intrusted with the administration of public justice; and it would be impossible for them to keep up in the people that veneration of their persons and submission to their judgments, without which it is impossible to execute the laws with vigor and success, if they should be continually exposed to the prosecutions of those whose partiality to their own causes would induce them to think themselves injured." This principle was asserted as early as the Book of Assize, 27 Ed. III, pl. 18, where A. was indicted, for that, being a judge of Oyer and Terminer, certain persons were indicted before him of trespass, and he had entered upon the record that they were indicted of felony, and judgment was demanded if he should answer for falsifying the record, since he was a judge by commission; and all the judges were of opinion that the presentment was void. The same protection was, at this early period, extended equally to grand jurors. In 21 Ed. III, Hil., pl. 16, a writ of conspiracy was sued in K. B., and the question was, whether it would be a good plea to the action, that the defendants were indictors in the case complained of; and it was held to be a good plea. *Stamford*, in his *Pleas of the Crown*, first published in 1567, says, (p. 178,) that no prosecution for conspiracy lies against grand jurors, for it shall not be intended that what they did by virtue of their office was false and malicious; and that the same law applied to a justice of the peace, for he shall not be punished as a conspirator for what he does in open session, as a justice. In *Floyd v. Barker*, (12 *Coke's R.*, 28,) the subject was considered by Lord Coke and all the judges, and they resolved, that no grand juror was responsible for finding an indictment, and that no judge, who tries and gives judgment in a criminal case, or does any act in Court, shall be questioned for it at the suit of the party against whom judgment was given. And it was observed, that, if the judges of the realm, who have the administration of justice, were to be drawn into question, except it be before the King himself, it would tend to the slander of justice, and those who are the most sincere would not be free from continual calumnia-

tions. In *Aire v. Sedgwick*, (2 *Roll. Rep.*, 190,) Noy, Judge, said that "no action lay against a judge for anything which he did as judge." But, the case of *Hammond v. Howell*, (1 *Mod.*, 184, 2 *Mod.*, 218,) is directly in point. The defendant was a recorder of London, and, as one of the judges of Oyer and Terminer, had fined and imprisoned the plaintiff because he brought in a verdict, as petit juror, contrary to the direction of the Court and the evidence. This case was brought after the case of Bushnell, who was another juror fined with the plaintiff for the same cause, and who had been discharged on *habeas corpus*, upon the ground that his imprisonment was illegal and a usurpation. The act of the judge was admitted to be illegal and void, and the effort was made to except the case from the general principle, by arguing that what the defendant did was not warranted by his commission, and that, therefore, he did not act as judge. But, the Court held the action to be without authority or the semblance of authority, and they declared that the bringing of the action was a greater offence than the imprisonment of the plaintiff, for it was a bold attempt both against the government and justice in general. A warrant granted by the Chief Justice of the Queen's Bench, in chambers, returnable into that Court, to arrest a party for breach of the peace, is such a judicial act as will protect him against an action for false imprisonment, although, from the want of proof before the Chief Justice, of the facts recited in the warrant, his act of issuing the warrant was declared to be without authority and illegal. (*Taaffe v. Downes*, 8 *Moore's P. C. C.*; 41, note.) In *Sutton v. Johnstone*, (1 *Term Rep.*, 498,) it was held, that no action lies against a judge for acts done in that capacity; that the law raises a presumption in favor of a judge, and will not (as in ordinary cases) suffer that presumption to be rebutted; and that, if otherwise, it would deter them from doing their duty. Many other English cases could be cited.

(3.) The rule, so early established and so uniformly adhered to in England, has, without an exception, been followed in this country. The case of *Yates v. Lansing*, (5 *Johnson*, 282,) is among the earliest cases, and is the leading case upon this subject. Chancellor Lansing committed Yates for contempt of Court. He was discharged, on *habeas corpus*, by Chief Justice Spencer, of the Supreme Court. After his discharge he was rearrested and imprisoned, by order of the Chancellor. This imprisonment was declared to be illegal by the Court of Errors, and the plaintiff was discharged. He then brought his action against the Chancellor, to recover the penalty given by statute. The defence rested, mainly, on the ground that the act complained of was done by the defendant in his judicial capacity, while sitting in the Court of Chancery, and that, for such an act, no action would lie. In the opinion delivered by Chief Justice Kent, the English authorities were all reviewed, and the ruling there established was affirmed in its broadest terms, as the law of this State; and it was asserted that judges of all Courts of record, from the highest to the lowest, are exempt from prosecution, by action or indictment, for what they did in their judicial character. The Supreme Court of the United States, in *Bradley v. Fisher*, (13 *Wallace*, 335,) affirmed the doctrines of *Yates v. Lansing*, in the following language: "In this country, the judges of the superior Courts of record are only responsible to the people or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great

trusts of their office." "Judges of Courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." The Circuit Courts of the United States are Courts of record, and have general jurisdiction of all offences committed against the United States.

(4.) The act here complained of was a judicial act. The Circuit Court of the United States for the Southern District of New York had jurisdiction of the offences charged against the plaintiff. It also had jurisdiction of his person, acquired by due process of law, and not terminated by any discharge. The sentence complained of formed a part, and appears in the record as a part, of a lawful criminal prosecution then pending before that Court. The defendant was before the Court, in custody, upon a good conviction theretofore had, and upon that conviction he was sentenced by the Court. How, then, can it be said that the pronouncing the sentence of the Court was not a judicial act? Certain inferior officers sometimes act ministerially and sometimes judicially. For errors or mistakes committed when they act ministerially, such officers are liable to the party injured, but they are never liable for errors of judgment when they have jurisdiction of the subject-matter, and the acts complained of were in their nature judicial. (*Barhyte v. Shepherd*, 85 N. Y., 251.) Acts done by judges of Courts of record are classified as judicial and extra-judicial. Their acts pertaining to the causes pending in their Courts are always judicial. (*Viner's Abridgment*, title *Judges*; *Floyd v. Barker*, 12 Coke, 23.) A judicial act, when performed by a judge of a Court of record, may be defined to be whatever he does in his judicial capacity, and which he cannot do in any other. To this rule there are a few exceptions, such as refusing writs of *habeas corpus*, and settling and signing bills of exceptions. These are exceptions to the general rule, made such by statute. As to all other acts of a judge, whether in Court or out of Court, if they cannot be done in any other than the judicial capacity, they are judicial acts. An extra-judicial act is one done by a judge in his private capacity, and which any citizen may do. If the act is one which none but a judge can do, then it is judicial and not extra-judicial. All acts done by a judge in furtherance of a case depending in Court, the issuing of writs, making orders, and passing sentence, &c., &c., are acts which can only be done by a judge and no other person, and must be done in a judicial capacity. The act here complained of was an act of judgment, where the defendant, being judge, at the end of an important criminal prosecution, where the plaintiff had been legally indicted, tried and convicted, exercised the proper functions of a judge, and, from the bench, in open Court, at a regular term thereof, assisted by the clerk and marshal, in the presence of the party, upon discussion, in view, subject to public observation, in presence of the bar, and when the party had been heard by counsel, pronounced the solemn judgment of the Circuit Court of the United States, which judgment was then and there entered upon the record, and was executed by the marshal as a judgment. For, mark, no execution or commitment was issued by the defendant to the marshal. The plaintiff was imprisoned by no personal direction of the defendant, but by virtue of the sentence, as a judgment of the Court, executed as such by the marshal. That record still stands, and must ever stand, as the judgment of the Circuit Court of the United

States, for there is no tribunal empowered to reverse it. It may be called irregular—it may be called illegal; but the judgment still remains the judgment of a Court having general jurisdiction over all offences committed against the United States, and which, beyond all question, had acquired jurisdiction of the person of the plaintiff. It is said that the Court had lost jurisdiction of the person of the plaintiff by reason of the payment of the \$200, and that, therefore, the sentence of the Court was simply the act of a private person in regard to a bystander. But, the Court having once acquired jurisdiction of the person, whether such jurisdiction had been lost, must, in its very nature, be a judicial question. It was one which a judge, as judge, was not competent to decide. It was a question to be decided by the Court, in Court. The plaintiff was before the Court, in the custody of the marshal. That he had been legally committed to the custody of that officer, upon conviction, was not disputed; but, it was insisted that something had occurred, since he was thus legally committed, which entitled him to be discharged. This question the Court was called on to adjudicate. Whether he should be discharged or be sentenced was then to be decided. The Court decided that he was not entitled to be discharged and passed sentence; and that decision was final, from which no writ of error lay. The determination thus made involved the questions—whether the first sentence was valid or void; whether, valid or void, it could be vacated at the same term; whether, if the first sentence were vacated, the Court had power to pronounce a second sentence; whether the power of the Court to pronounce the second sentence was affected by the alleged payment of the fine; and whether the plaintiff had, in fact, paid the fine. All these questions the Circuit Court was forced to consider and determine. The defendant presiding, as judge, pronounced the judgment of the Court thereon; and now it is sought to hold him liable upon the ground that, in so doing, he did not perform a judicial act.

IX. The judgment should be reversed, and judgment be given for the defendant.

The opinion of the General Term was as follows:

DANIELS, J. This action has been brought to recover for the unlawful imprisonment of the plaintiff by the defendant, who is the United States District Judge for the Eastern District of New York. It appears by the complaint and the copies of the papers annexed to it, showing the proceedings had, that the plaintiff was indicted, tried, and convicted at a term of the Circuit Court of the United States for the Southern District of New York, held by the defendant, of the crime of larceny committed by stealing mail bags of the value of less than twenty-five dollars. By the Act of Congress defining the offence and its punishment, that rendered the plaintiff liable to be sentenced to pay a fine not exceeding two hundred dollars, or to be imprisoned not exceeding one year. In finally disposing of the case, the defendant imposed both these punishments upon him. The plaintiff paid the fine and applied to be released from custody by means of the writ of *habeas corpus*, because he had suffered one of the alternative punishments provided for the offence. That was denied, and the Court, by order entered, directed the sentence which had been pronounced to be vacated, and then sentenced the plaintiff to one year's imprisonment upon his conviction. He had then been in custody five days, and afterwards applied



to the Circuit Court of the United States, where the Circuit Judge, Lewis B. Woodruff, the District Judge of the Southern District, Samuel Blatchford, and the defendant, were upon the Bench, presiding, for a writ of *habeas corpus* to discharge him from further imprisonment, because of its illegality. The application was heard, and, after being considered, was denied. He then applied for another writ of *habeas corpus*, which, together with a writ of *certiorari*, was issued by the Supreme Court of the United States, and, upon the hearing had on the return made to both writs, the plaintiff was discharged from custody, the Court holding that he could not lawfully be sentenced to imprisonment after what had transpired in the case. (*Ex parte Lange*, 18 Wallace, 163.) After that this action was brought against the defendant, for false imprisonment; and a very able argument has been made by the learned counsel for the plaintiff in favor of maintaining it. But the report of the case itself, as it was considered and decided by the Supreme Court of the United States, would seem to be sufficient to negative the assertion that such an action can be maintained, upon the facts in the case. The sentence was changed by the same Court, at the same term during which the first sentence was pronounced; and a learned and extended examination by the Court of last resort was found necessary for the purpose of maintaining the position that the change was improperly and unlawfully made. The opinion in which that view was sustained—and it was done by one of the ablest judges of the present time—proved unsatisfactory and unconvincing to two members of that learned Court; and its conclusions were controverted by one of those two, in an opinion rarely if ever excelled in the thoroughness of its investigations and researches, or the vigorous logic tracing and exhibiting their results. Under these circumstances, it cannot with the least propriety be held that the point presented to the defendant was not a doubtful one, or that its decision and determination did not require the exercise of judicial functions. The examination and discussion which it received when it was finally decided, most conclusively establish the contrary; and that of itself should be deemed to be sufficient to shield the defendant from personal liability. The law was, to say the least, in such a condition as to afford ostensible support to each side of the proposition presented, and to render the development of a satisfactory and consistent conclusion intricate and difficult. Different minds could very well, and would very naturally, be led to different results concerning the propriety of the course pursued in the disposition of the case by the Circuit Court. Two other judges of great learning and experience in that Court held with the defendant, that the proceedings were not invalid; and the plausibility of their decision was finally corroborated by the opinion of Mr. Justice Clifford. If, with that weight of authority in support of the action that was taken, a judge could be held personally liable for its consequences, judicial protection would be at once wholly destroyed, and the utility of the Courts practically subverted. For, the result would finally be, that all unauthorized determinations arising out of misapprehensions of the law, or of miscalculations of the true weight of authority, affecting the person or property of the defeated party, would furnish a cause of action for trespass or false imprisonment. And no Court could possibly be protected against such liability; for, even those of last resort not unfrequently find it necessary to re-examine,

distinguish, and finally overrule their own decisions. And it certainly is no discredit to the learned tribunal by whose mandate the plaintiff was set at liberty, to say that it has not always found itself at liberty to disregard that alternative. The law is the most complicated of all practical sciences; and it cannot fail to become more so as the intricacies of business and enterprise increase and advance. Differences of opinion upon legal subjects cannot be avoided, even by the most patient attention and laborious investigation; and, when they do arise, erroneous conclusions are required to be excused, as the natural consequences of human fallibility. When a party has been brought before a Court of justice in a legal manner, and circumstances are presented requiring a decision to be made, the tribunal making it cannot be deprived of protection because it may afterwards, upon further and fuller investigation, turn out to have been erroneous. That was the case of the plaintiff. He had been convicted of a crime punishable by fine or imprisonment. The Court inadvertently imposed both. When its consideration was directed to the misapprehension under which the sentence had been pronounced, an effort was made to correct it in such a manner as to comport with what was considered to be just in the case; and that correction it was held could be and was designed to be made. The emergency which had arisen required a decision to be made. The judge could neither avoid it nor escape from it. His duty required him to act, and he had the power to decide, and he did so, according to the best of his judgment; and for that he cannot, upon any sound principle of accountability, be held to be personally liable. He had, for that purpose, jurisdiction of the person and the subject-matter. Both were before him, and his decision was necessary. He could not avoid making it if he would, and, as it turned out, he decided erroneously.

The rule by which judicial officers have been exonerated from liability for the consequences of their decisions has gone much further than is required for the protection of the defendant. In *Yates v. Lansing*, (5 Johns., 282,) the assertion was approvingly mentioned, "that no authority or semblance of an authority" had been urged for an action against a judge of record, for doing anything as judge; that this was never before imagined, and no action would lie against a judge for a wrongful commitment any more than for an erroneous judgment, (*Id.*, 294.) That principle was affirmed afterwards, in the same case, by the Court of Errors, (9 *Id.*, 395); and to the same effect are *Jenkins v. Waldron*, (11 *Id.*, 114); *Vanderheyden v. Young*, (*Id.*, 150); *Wilson v. Mayor of New York*, (1 Denio, 595); *Weaver v. Devendorf*, (3 *Id.*, 117); *Bradley v. Fisher*, (13 Wallace, 335). In the case of *The Rochester White Lead Co. v. The City of Rochester*, (3 Comst., 468,) it was said, that, "whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action, for the motives which influence him and the manner in which such duties are performed," (*Id.*, 466.) To secure this immunity, it is sufficient that a case requiring judicial action is presented to the judge. (*Hannan v. Brotherson*, 1 Denio, 537; *Landt v. Hiltz*, 19 Barb., 283.)

The defendant's right to exemption from personal liability in this case rests upon still more cogent circumstances than those already relied upon. For, the

decision of the United States Supreme Court, to which he was bound to subordinate his action, had previously affirmed the existence of the authority which he exercised in changing the punishment. (*Cheangkee v. United States*, 3 Wallace, 320; *Basset v. United States*, 9 Id., 88.) In the last case, the person proceeded against had pleaded guilty to an indictment, and had been sentenced to imprisonment, and was actually sent to prison, in pursuance of the sentence. A few days after that he was brought again into Court, by means of a writ of *habeas corpus*, and, on the district attorney's motion, the judgment was set aside and the prisoner had leave to withdraw his former plea of guilty. This was all done during the same term, as it was in the case of the plaintiff, and the Court unanimously held it to be proper. That was not done because the proceeding was favorable to the defendant, but for the sole reason that, during the same term, the Court had full power to control and change its judgments. That subject was very fully discussed and the authorities cited upon which the principle rested, by Mr. Justice Clifford, in his opinion in *Ex parte Lange*, (18 Wallace, 191 to 195). A decision of the same nature was made after the execution of the sentence had commenced, by reducing the term for which transportation had been provided, in the case of *Rex v. Price*, (6 East, 323, 327.) The Circuit Court had no power, even if it had the disposition, to gainsay or deny the accuracy of the legal principle sanctioned by the case of *Basset v. United States*, (*supra*.) It not only had the power, but it was bound to conform its action to the principle maintained by that authority. That was as obligatory upon the defendant at the time as positive legislation would have been; and he appears to have acted under its sanction. At that time his action was strictly lawful, and it cannot be denied that the authority of that case then afforded him complete protection for the change made in the sentence, and it would probably be conceded to continue to do so, had it not been since impaired as authority by the final decision made in the plaintiff's favor. Under the doctrine of that case, he was vested with clear jurisdiction over the subject-matter brought before him, and it at the same time indicated the manner in which it should be exercised by him. That it was, as the learned justice stated in his opinion in the plaintiff's favor, decided "in general terms, without much consideration," (18 Wallace, 167,) could not change its effect as authority, where it was followed by the Circuit Court. The defendant presiding there could not then, with the least propriety, have assigned that as a reason for disregarding it as authority. The decision was then in full force, as it had been made. It was promulgated by the Court, in its published reports, as a proper exposition of the law; and it would be exceedingly unjust, under such circumstances, to render the defendant's protection dependent upon the views afterwards taken to correct it, by the Court that had pronounced it. That tribunal could correct it, as it has, when it was discovered to be wrong, but he had no such power over it. It was his duty to conform his official action to it, and for that it cannot be that he can be held personally liable because the authority of the decision has since been superseded by another. His conduct, on the other hand, should be so far sustained as to secure him immunity, the same as it would have been if a statute had existed in favor of it, which the Legislature afterwards repealed. For future purposes the repeal obliterates the law, the same as though it had never been enacted. But acts previously performed are still maintained by force of the

law which sanctioned them at the time of their occurrence. This principle is too familiar to require the citation of authorities for its support, and all its reasons are applicable to the case now before this Court.

The principle invoked for the support of this action would sanction suits against judges for their official acts, in a large class of cases, if it should receive the approval of the Courts. It would be difficult to exclude from its comprehension any cases where imprisonment should be pronounced or continued which might afterwards be declared to be not warranted by the final view taken of the law. No authority has gone so far as that, and it is not probable that any will be hereafter so widely extended. The settled principle, on the contrary, is, that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. (*Bradley v. Fisher*, 18 Wallace, 347.)

The defendant cannot be held liable for the consequences of the imprisonment following the change made in the sentence. He acted judicially in making it. The exigency required him to decide, and that included the power to decide wrongly, without liability to himself, particularly as it practically required the abrogation of an existing and, for the time, controlling authority, to render the error apparent. It is entirely evident that he was actuated solely by the motive of performing his duties, for the best interests of the public, by subjecting the plaintiff to what was believed to be no more than a proper measure of punishment for the offence of which he had been convicted. That he considered his acts to be fully warranted by the decision of the tribunal from which he was bound to receive the law, is clearly shown by what the case shows to have transpired; and in that view he was supported by other eminent judges. To hold him liable for a change afterwards made in it, would seem to be hardly less than a positive perversion of justice.

That he cannot be held liable for the five days' imprisonment under the sentence as it was at first pronounced, follows from the view which was adopted in the decision of the *habeas corpus*. For, it was there distinctly held, that "the judgment first rendered, though erroneous, was not absolutely void. It was rendered by a Court which had jurisdiction of the party and of the offence, on a valid verdict. The error of the Court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void." (*Ex parte Lange*, 18 Wall., 174.) And, as the defendant had the same jurisdiction over the subject when the plaintiff's first sentence was vacated and the last one was pronounced, he is equally entitled to the same protection as to this portion of the case. The sentence, under the circumstances, was not void. It was simply voidable, by the operation of the restriction subsequently imposed upon the principle established by the case of *Basset v. United States*, (*supra*;) and that effect was first given to it long after the power of the defendant's Court had been exhausted.

The order should be reversed, and an order entered sustaining the demurrer, with the usual leave to the plaintiff to amend, on payment of costs.

## III.

## RULES.

*Rules of the Circuit Court of the United States for the Southern District of New York, adopted since the publication of the twelfth volume of these Reports.*

JULY 1st, 1876.

The cases and points, and all other papers furnished to the Court in calendar causes, other than causes for trial before a jury and reviews in bankruptcy, shall be printed, unless, by special order of the Court obtained eight days before the hearing, such printing or some part thereof shall be dispensed with. The appellant in appeals, the plaintiff in error in writs of error, and the moving party on motions for a new trial and the argument of demurrers, shall cause the papers to be printed. In all other cases, each party shall cause to be printed the pleadings, proofs and papers filed on his behalf. At the beginning of the argument each party shall furnish to his adversary three copies of his printed points, and, at least eight days before the argument, three printed copies of all other papers shall be furnished by the party printing the same to the adverse party. A party recovering costs shall be allowed his disbursements for the printing required of him by this rule.

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JANUARY 6th, 1877.

On filing the written consents of all the parties, orders may be entered in the rule books, in cases at law or in equity, with the same effect as if directed upon such consent by a judge, except final decrees in equity.

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FEBRUARY 1st, 1877.

1. Notice of an intended application to the Circuit Court for the exercise of the general superintendence and jurisdiction conferred by section 4986 of the Revised Statutes of the United States, must be given within ten days after the entry in the District Court of the order complained of, by filing such notice in the clerk's office of that Court, and serving the same on the adverse party. The application must be made within thirty days after the entry of such order, or within such further time as may be allowed by an order of the District Judge filed within said thirty days in the clerk's office of that Court. An application cannot be made at a later period.

2. Except where special provision is otherwise made by statute, or where the aggrieved party proceeds by bill in equity, the application must be by petition filed in the office of the clerk of the Circuit Court, and verified by oath. The petition must designate the order complained of, and set forth the facts of

the case, so far as may be necessary to show the errors, whether of fact or of law, alleged to have occurred in the District Court, and must point out such errors specifically, and the relief sought therefor.

3. The petitioner must, within five days after filing the petition, procure from the clerk of the Circuit Court a certificate of the filing of such petition, designating the order therein complained of, by its date, and file the same in the office of the clerk of the District Court.

4. Within ten days after filing the petition, the petitioner must serve a copy thereof on the adverse party, who may file an answer thereto, verified by oath, within ten days after such service, and must, in that case, serve a copy of the answer on the petitioner within the further period of ten days. The petitioner may, within ten days thereafter, file a reply to the answer, and serve a copy thereof on the adverse party. The clerk may once extend either of these periods, by order made before its expiration.

5. The application will be heard upon these papers only, unless the Court shall, of its own motion, otherwise direct. As soon as the case is disposed of, the clerk of the Circuit Court must certify the order to the District Court.

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FEBRUARY 5th, 1877.

In actions at law, a consent to a reference of the whole issue must likewise contain a provision that judgment shall not be entered until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered thereon. After a reference, at any time before the entry of judgment, either party may move for a new trial upon a case or exceptions, and, if such motion be denied, the decision of the motion and the questions involved in it may be entered on the record, as if it had been a ruling made upon a trial by the judge without a jury, and excepted to in like manner. When a motion for a new trial is intended to be made, the Court may extend the time for entering judgment, upon the application of the moving party, and may stay all other proceedings until the decision of the motion.

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*Rules of the Circuit Court of the United States for the Northern District of New York, adopted since the publication of the eighth volume of these Reports.*

*In Equity*, MARCH 29th, 1876.

After the appearance of a defendant, the service of notices and also of motion papers upon such defendant or upon the complainant, except papers to bring a party into contempt, may hereafter be made by mail, when the person making the service and the person on whom it is to be made reside in different places within this State, between which there is a regular communication by mail. In case of such service, the notice or other paper to be served must be deposited in the post office at the residence of the person making the service, enclosed in an envelope, addressed to the person on whom it is to be served, at his place of

residence, and the full postage prepaid. When the service is by mail, under this rule, it shall be double the time required in case of personal service, except notice of a motion, which may be made ten days before the time appointed therefor, and except service of notice of trial and final hearing, which may be made sixteen days before the term at which the trial or final hearing is to be had, including the day of service.

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JUNE 28th, 1876.

In actions at law, a consent to a reference of the whole issue must likewise contain a provision that judgment shall not be entered until after ten days' notice of the filing of the report of the referee and of the judgment proposed to be entered thereon. After a reference, at any time before the entry of judgment, either party may move for a new trial upon a case or exceptions, and, if such motion be denied, the decision of the motion and the questions involved in it may be entered on the record, as if it had been a ruling made upon a trial by the judge without a jury, and excepted to in like manner. When a motion for a new trial is intended to be made, the Court may extend the time for entering judgment, upon the application of the moving party, and may stay all other proceedings until the decision of the motion.

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*Rule of the Circuit Court of the United States for the Eastern District of New York, adopted since the publication of the ninth volume of these Reports.*

JANUARY 22d, 1877.

1. Notice of an intended application to the Circuit Court for the exercise of the general superintendence and jurisdiction conferred by section 4986 of the Revised Statutes of the United States, must be given within ten days after the entry in the District Court of the order complained of, by filing such notice in the clerk's office of that Court, and serving the same on the adverse party. The application must be made within thirty days after the entry of such order, or within such further time as may be allowed by an order of the District Judge filed within said thirty days in the clerk's office of that Court. An application cannot be made at a later period.

2. Except where special provision is otherwise made by statute, or where the aggrieved party proceeds by bill in equity, the application must be by petition, filed in the office of the clerk of the Circuit Court, and verified by oath. The petition must designate the order complained of, and set forth the facts of the case, so far as may be necessary to show the errors, whether of fact or of law, alleged to have occurred in the District Court, and must point out such errors specifically, and the relief sought therefor.

3. The petitioner must, within five days after filing the petition, procure from the clerk of the Circuit Court a certificate of the filing of such petition, designating the order therein complained of, by its date, and file the same in the office of the clerk of the District Court.

4. Within ten days after filing the petition, the petitioner must serve a copy thereof on the adverse party, who may file an answer thereto, verified by oath, within ten days after such service, and must, in that case, serve a copy of the answer on the petitioner within the further period of ten days. The petitioner may, within ten days thereafter, file a reply to the answer, and serve a copy thereof on the adverse party. The clerk may once extend either of these periods, by order made before its expiration.

5. The application will be heard upon these papers only, unless the Court shall, of its own motion, otherwise direct. As soon as the case is disposed of, the clerk of the Circuit Court must certify the order to the District Court.

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*Rule of the Circuit Court of the United States for the District of Connecticut,  
adopted since the publication of the tenth volume of these Reports.*

*In Equity, APRIL TERM, 1876.*

"The parties shall be allowed to examine their witnesses and exhibit their proofs in open Court, at the hearing of the cause, in the same manner as on the trial of actions at common law. Provision shall be made by the party or parties so examining the witnesses in Court, for taking down the testimony of such witnesses, and placing a transcript thereof on file, in all appealable cases."

The foregoing Rule, adopted at the April Term, 1857, shall hereafter apply to those cases only in which the parties, or their solicitors, shall file with the clerk a stipulation in writing, signed by them, containing a waiver of their right to the mode of proof according to the rules of the Supreme Court of the United States, and an agreement that the mode of proof shall be according to the foregoing rule: *Provided*, that such stipulation shall have no effect upon any causes now at issue, unless filed at least three months before the session of the Court at which the cause is claimed for trial, nor upon any cause not now at issue, unless filed within sixty days after issue joined. But this provision may be waived by the written consent of both parties.



# INDEX.

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## A

### ACTION.

See DUTIES, 1 to 6.  
PROVOST MARSHAL.

### ADMIRALTY.

1. On a libel *in rem*, in the District Court, against a vessel, the vessel was there discharged, on a stipulation for value. The libel was dismissed, and an appeal was taken by the libellant to this Court. Thereafter the stipulators for value became insolvent, and the libellant moved, in this Court, that the claimant file new security for value: *Held*, that the motion must be granted, and that the Court had the power to require the claimant to furnish new stipulators, and to enforce such requirement. *The Virgo*, 255
2. The effect of the appeal was to leave the libellant with the same rights in respect to stipulators as if no decree had been rendered. *id.*
3. The absence from the general Admiralty Rules of the Supreme Court, and from the Rules of this Court, of any provision for the case of insolvent stipulators in actions *in rem*, furnishes no reason for not affording the relief sought. *id.*
4. Part of the obligation which a claimant in an action *in rem* assumes when he receives at the hands of the Court property in its custody, by substituting therefor personal security, by way of a stipulation for value, is to maintain his stipulation good, in the matter of the sureties. *id.*

5. A collision between a schooner and a steamer occurred in July, 1868, whereby the schooner and her cargo sank and were totally lost. The steamer carried the master and crew of the schooner to New York. The libel was verified in July, 1870, but was not filed until February, 1873. In January, 1872, a mortgage on the steamer and three other vessels was executed, payable two years after date. It did not appear that any part of it had been paid. No excuse was shown for the delay in bringing the suit: *Held*, that the collision claim must, on account of its staleness, be postponed to the mortgage. *The Columbia*, 521

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### AGENT.

See BANK.  
LIFE INSURANCE.

### ARREST.

See BANKRUPTCY, 11.

### AUTHOR.

See COPYRIGHT.

## B

### BANK.

1. A bank in Illinois, owning a draft

on one W., in Washington, North Carolina, transmitted it by mail to a bank at Wilmington, North Carolina, with directions to collect and remit the returns. W. resided 170 miles from Wilmington. The Wilmington bank credited the draft to the Illinois bank, and entered it for collection, and so advised the latter by a letter mailed at Wilmington, and then sent the draft to B., a banker at Washington, who was its correspondent and collecting agent there. B. collected the draft, but failed before remitting the amount to the Wilmington bank, although in good credit when the draft was sent to him. In a suit brought by the assignee of the Illinois bank against the Wilmington bank, to recover the amount of the draft: *Held*, that the plaintiff was entitled to recover. *Kent v. Dawson Bank*, 237

2. The contract of the defendant was made in North Carolina, and to be wholly executed there, and was not governed by the law of Illinois, but by that of North Carolina. *id.*
3. The question of the liability of the defendant for the default of B. is an open one, so far as any statute or judicial decision in North Carolina is concerned, to be determined by the general principles of commercial law. *id.*
4. An undertaking to "collect" is not merely an undertaking to select a suitable agent, and transmit the paper to him to collect as agent for the owner, but is an undertaking to respond for any default of the agent selected. *id.*

See CORPORATION, 1 to 3.

#### BANKRUPTCY.

1. Before the commencement of proceedings in bankruptcy, the United States brought an action at law against the bankrupts, to recover the value of goods which had been forfeited for violation of the customs revenue laws. The defendants, after the bankruptcy proceedings were commenced, admitted the right of the United States to recover, and a judgment in favor of the United States was rendered. The United States proved, as a debt, against the bankrupts, the claim for the value of the goods, and sustained it by evidence derived from the books and papers of the bankrupts, seized under a warrant issued under § 2 of the Act of March 2d, 1867, (14 U. S. Stat. at Large, 547): *Held*,
  - (1.) That the claim was provable as a debt under § 19 of the bankruptcy Act of March 2d, 1867, (14 U. S. Stat. at Large, 525);
  - (2.) That the claim was not so merged in the judgment as not to be provable;
  - (3.) That the evidence from the books and papers was competent. *In re Vetterlein*, 44
2. The provisions of the 29th section of the bankruptcy Act of March 2d, 1867, (14 U. S. Stat. at Large, 531,) that, "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the Court for a discharge from his debts," require the application for a discharge to be made in all cases within one year from the adjudication of bankruptcy, whether there are debts proved or assets received, or not. *In re Sloan*, 67
3. The District Court has no power, in any case, to grant a discharge, unless it be applied for within one year from the adjudication of bankruptcy. *id.*
4. In a suit in equity, brought by an assignee in bankruptcy, to recover certain notes alleged to have been transferred in violation of the bankruptcy Act, the bill alleged the filing of a voluntary petition by the bankrupt, the appointment of the assignee, and the assignment to him. These allegations were admitted by the answer: *Held*, that it was not necessary

- the bill should allege directly that there had been an adjudication of bankruptcy. *Lakin v. First Nat. Bank*, 88
5. Circumstances discussed, on the question as to whether the officers of a bank had reasonable cause to believe that the bankrupt was insolvent, or that the transaction between the bank and the bankrupt was in fraud of the bankruptcy Act. *id.*
  6. What would be evidence of insolvency or fraud in a strictly commercial community, may have less significance in a rural district. *id.*
  7. Bill dismissed, without costs. *id.*
  8. Under § 5122 of the Revised Statutes of the United States, it is necessary that a petition by a corporation in voluntary bankruptcy should be authorized by a vote of a majority of the corporators at a legal meeting called for the purpose. *Freeman's Bank v. Smith*, 220
  9. Where the owner of stock in a corporation dies before such meeting is held, leaving no will, and no administration on the estate is granted before the corporation is adjudged bankrupt, there is, as to such stock, no corporator. *id.*
  10. Such meeting is not one of the meetings of stockholders provided for in § 21 of the statute of New York in regard to the formation of corporations, (*Act of February 17th, 1848, Laws of 1848, chap. 40, § 21, p. 59.*) and it is not necessary it should be called in the manner prescribed by said section. *id.*
  11. An uncontested order, made by a register in bankruptcy, in Vermont, that a bankrupt produce certain books and papers relating to his business, was disobeyed by him. On proof thereof, and on service of notice on the bankrupt, the District Court for Vermont adjudged him to have been guilty of a contempt, and ordered that he deliver up the books and papers to the marshal, and pay the costs, and that, in default thereof, he be arrested by the marshal, or his deputy, and committed to jail to be safely kept until discharged by order of said Court. The deputy of the marshal demanded the books and papers and costs from the bankrupt, in New Hampshire, which he refused to deliver or pay, and then the deputy arrested him in New Hampshire, and committed him to jail in Vermont. On a *habeas corpus* sued out by the bankrupt: *Held*,
    - (1.) The order of the register was the order of the Court, and, when it was disobeyed, it was proper to institute proceedings for contempt directly on such disobedience;
    - (2.) It was proper to direct that the bankrupt be committed until discharged by order of the District Court;
    - (3.) The arrest in New Hampshire was illegal, and the imprisonment in Vermont, in pursuance of such arrest, was, therefore, illegal, although the warrant of arrest was valid. *In re Allen*, 271
  12. A. was appointed receiver of an insolvent corporation, by a State Court. The corporation being afterwards adjudicated a bankrupt, the assignee in bankruptcy, in this suit against A., obtained a decree that the appointment of A. as receiver, and the transfer thereby of the property of the corporation to him, was void, as against the rights of the plaintiff under the bankruptcy Act, and that A. must account to the plaintiff for the property. In taking such account: *Held*,
    - (1.) The services of attorney and counsel were properly and necessarily rendered to A., as receiver, so far as such services benefitted and preserved the estate, and were not hostile to the proceedings in bankruptcy;
    - (2.) Nothing can be allowed to A., out of the fund, for the services of his counsel in this suit, or in reference to the bankruptcy proceedings, he having unsuccessfully resisted such proceedings, or in the matter of the accounting of A. before the State Court, which took place after this suit was brought, or for the referee's fees in such accounting. *Platt v. Archer*, 351

13. In a petition in involuntary bankruptcy, under § 39 of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 536,) as amended by § 12 of the Act of June 22d, 1874, (18 *Id.*, 180,) it is sufficient to state upon belief, without averring either knowledge or information, that the petitioning creditors constitute the required number, and that their debts constitute the required amount. *In re Mann*, 401
14. Where the petition is in such form, the oath to it is not insufficient, if it is the form of oath prescribed in Form No. 54 of the Forms in Bankruptcy, although such form of oath purports to cover only matters which are stated on knowledge and matters which are stated on information and belief. *id.*
15. Under the provisions of § 12 of the Act of June 22d, 1874, (18 *U. S. Stat. at Large*, 180,) amendatory of § 39 of the bankruptcy Act of March 2d, 1867, (14 *Id.*, 536,) it is not necessary to the invalidity of an act alleged to be preferential in its character, which took place prior to December, 1873, that it should come up to the test imposed by such section 12, but such act is to be tried according to the law of 1867. *Oxford Iron Co. v. Slafter*, 455
16. The testimony of the parties to a transaction questioned as preferential under the bankruptcy Act, as to their intentions, though competent, is inherently weak, and can rarely avail against the stronger proof which the transaction itself affords. *id.*
17. Evidence considered, as to whether a debtor was insolvent at the time he conveyed certain real estate to a creditor, to apply on a debt due to such creditor, and as to whether the creditor had reasonable cause, at the time, to believe that such insolvency existed. *Platt v. Stewart*, 481
18. L. owned the furniture in a hotel, upon which furniture he had given chattel mortgages to 'S., the owner of the hotel, as security for the rent of the hotel. L. becoming insolvent, executions were levied on such furniture under judgments recovered after the giving of such mortgages. Subsequently, L. was adjudged a bankrupt, and his assignee in bankruptcy brought this suit against S. and the execution creditors, to set aside the mortgages and the judgments, and to have awarded to him the proceeds of the furniture. The Court set aside the mortgages, but awarded the proceeds of the furniture to the execution creditors. *id.*
19. Liens by execution upheld as valid, as against an assignee in bankruptcy of the debtor, where the judgments were for just debts, due and payable, and were obtained not only without the slightest aid or concurrence of the debtor, but generally in spite of his active and unjustifiable opposition. *id.*
20. Under the statute of New York in regard to the filing of chattel mortgages, (*Laws of New York*, of 1833, chapter 279, p. 402, section 2, *Act of April 29th*, 1833,) where the mortgagors in a chattel mortgage resided in Westchester county, and not in the city of New York, and the mortgage was filed in the latter place, and not in the former: *Held*, that the mortgage was void as against creditors of the mortgagor, represented by his assignee in bankruptcy. *id.*
21. Under section 3 of the same Act, in regard to the refileing of a copy of the mortgage, "together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof," a statement in regard to a mortgage given as security for rent to accrue on a lease of real estate, merely said: "I hereby certify that the lease within referred to still exists in full force, and the interests of the parties, and my interests, thereunder remain unchanged, except so far as the same have been altered by the payment of rent accrued:" *Held*, that such statement was insufficient. *id.*
22. The mortgage, a copy of which was refiled with such statement, described

the property it covered by referring to a schedule annexed to it, and a copy of such schedule was refilled with the copy of the mortgage. The schedule described the property only as the goods and chattels described in a prior mortgage made by the mortgagors to the mortgagee, and in the schedule thereto attached, and filed in a certain office at a certain date, and all other goods and chattels in a certain building: *Held*, that, under § 3 of said Act, such description of the property was not a sufficient statement of the property remaining subject to the mortgage at the time of such refilling. *id.*

23. The lessees having agreed by the lease to give to the lessor, as security for the accruing rent, a chattel mortgage, and to renew and extend it, from time to time, "as shall be necessary to effect that purpose," and that such mortgage "shall be a continuing lien and security for the payment of such rent," and the mortgages given being held void as against creditors: *Held*, that such agreement in the lease did not secure to the lessor, aside from a lien by a valid mortgage, any lien as against other creditors who were in a condition to contest his lien. *id.*

24. The mortgage being void as to creditors, no title to the mortgaged property passed to the mortgagee by reason of a failure to pay the rent, so as to cut off any right creditors would otherwise have to contest the mortgage. *id.*

25. *Held*, also, that this action was well brought by the assignee in bankruptcy, and could be maintained, (1st), because, by § 35 of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 534,) he is expressly empowered to bring an action to recover property fraudulently conveyed by the bankrupt; (2d), that, there being creditors who had liens on the personal property covered by the chattel mortgages, the assignee might maintain the action as representing them, although he denied the validity of their liens; and (3d), that, the assignee having an unquestioned stand-

ing in Court as to a portion of the fund, it is proper that all the trust fund, and the conflicting claims to it before the Court, and which must ultimately be decided by it, should be passed upon in this suit. *id.*

*See* CORPORATION, 1 to 3.

## BOND.

*See* MORTGAGE.  
MUNICIPAL CORPORATION.  
SURETY.

## BRIDGE.

*See* CONSTITUTIONAL LAW, 4 to 8.

## C

### CERTIORARI.

*See* MUNICIPAL CORPORATION, 11,  
12, 16.  
REMOVAL OF CAUSES, 10.

### CHATTEL MORTGAGE.

*See* BANKRUPTCY, 18 to 25.

### COLLECTOR.

*See* DUTIES, 1 to 6.

### COLLISION.

1. A tug, with five boats in tow behind her, in two tiers, three in the first tier, and two in the second tier, was passing up the narrow part of a harbor, when a side-wheel steamboat, going in the same direction, went by the tug and her tow. In doing so, her suction dragged back the boats in the second tier, so as to break some of their lines, and then the swell she created drove them against the sterns of the boats in the first tier, so that the middle boat in the first tier was damaged: *Held*,  
(1.) If the steamboat desired to pass at the speed she had maintained

up to the time she created the swell, she ought to have passed at a greater distance;

(2.) If the width of the channel was such that she could not pass at a greater distance, she should have reduced her speed in due season to prevent so heavy a swell. *The C. H. Northam*, 81

2. A vessel, the N., was lying at anchor inside of the Delaware Breakwater, in the month of February, having gone there for safety from an approaching storm. Night came on, and it was very dark, and a large number of vessels came in, and a severe snow storm set in. The N. had no watch on deck. It was not proved that she had a light set. The C. came in for shelter from the storm, having proper lights, and a proper lookout, and, in anchoring, collided with and sank the N.: *Held*, that the N. was in fault in not having a watch on deck, and could not recover against the C. *The Clara*, 509

3. A vessel being properly and securely fastened to a pier in the East river, a steamboat passed by so near, and at such a rate of speed, that the swell she created threw the vessel against another one, and damaged the former: *Held*, that the steamboat was liable for the damage, because it was negligence in her to pass by so near, at such speed, the channel at the place being over one thousand feet wide, and open to her navigation, without obstruction, to that width. *The Morreania*, 512

4. A tug with her captain on deck, and a man at her wheel, and no other lookout, held not to have had a proper lookout. *The Tillie*, 514

5. The absence of lights on a canal-boat held unimportant, when she could have been seen without lights on her, and when there was so much daylight that lights on her would not have afforded any aid in discovering her. *id.*

6. The Hudson River is a national highway, upon which steamtugs with

their tows, and steam passenger boats, are equally at liberty to travel. Each class of boats may occupy the river with their boats of such size and construction as they may choose, and at the speed they may think fit, subject to the qualification, that the rights and interests of others are not unreasonably impaired. *The Daniel Drew*, 523

7. There is no absolute rule of law which limits the space a boat or its accompaniments may occupy upon a public river, or which prescribes the speed it may use, or the swell it may make, or how near it may come to another boat. It depends upon the reasonableness of the thing done, under all the circumstances of each particular case. It is not the rule, that, in the event of an injury from a swell, the boat causing the swell is at all events responsible. *id.*

8. The steamtug Ohio, with one boat at her side, and a tow of twenty boats in five tiers, at her stern, was passed by the steam passenger boat Daniel Drew, in deep water and with a light wind, and, by the swell and motion caused by the Drew, and by the slacking of the tug's hawser, the boats in the tow were thrown against each other, and the libellant's boat was injured. It appeared that the speed was that usually kept up in passing a tow in deep water, that the swell made was not unusual, that neither those on the Ohio nor those on the Drew apprehended danger at the time from passing at the speed kept up, that the boats in the tow were not well arranged, and that the Drew exercised reasonable care and diligence: *Held*,

(1.) That the Drew was not liable for an injury to one of the boats in the tow, from the collision mentioned;

(2.) That the accident was in part, at least, attributable to the fact that the tiers of boats were towed by lines only six or eight feet in length, with nothing to prevent their coming together when operated upon by a force in the rear, and with a slackened hawser from the tug. *id.*

9. The English cases on the subject examined. *id.*

*See* ADMIRALTY, 5.  
EVIDENCE, 9 to 14.  
PARTY, 2.

# CONSTITUTIONAL LAW.

1. A clause of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 377,) increasing the rate of postage on certain mail matter, is not unconstitutional, although it originated in the Senate and was not an amendment to a bill for raising revenue, originating in the House of Representatives, because it is not a bill for raising revenue, within the meaning of *article 1, section 7, subdivision 1*, of the Constitution, which provides that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills." *United States v. James*, 207

2. A bill establishing rates of postage is not a bill for raising revenue, within the meaning of the Constitution. *id.*

3. Post office laws may be revenue laws without being laws for raising revenue. *id.*

4. A citizen of New York brought suit in this Court against the municipal corporations of the cities of New York and Brooklyn, and certain individual citizens of New York, to restrain the building of a bridge in New York across the East River, a navigable river, on the ground that it would be a public nuisance: *Held*, that this Court had no jurisdiction of the suit, so far as any question of a violation of the law of New York was concerned, but that it could take jurisdiction to enquire whether the bridge was being so built as to violate the Constitution or laws of the United States. *Miller v. The Mayor, &c., of New York*, 469

5. The history of the legislation of New York and of the United States, in regard to such bridge, reviewed. *id.*

6. Under such legislation of the United States, if the bridge is constructed in conformity with the requirements of law, it follows that the navigation of the river will not thereby, in contemplation of law, be obstructed, impaired, or injuriously modified. *id.*

7. Congress had power to authorize, as a regulation of commerce, the building of the bridge in the prescribed manner. *id.*

8. It appearing that the bridge was being constructed according to the requirements of the legislation of Congress, and that the State of New York had, by subsequent legislation, sanctioned its being constructed in such manner, an injunction to restrain its erection, as a public nuisance, was refused. *id.*

# CONSTITUTION OF THE UNITED STATES.

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# CONTEMPT.

*See* PATENT, 22.

# CONTRACT.

*See* BANK.

# COPYRIGHT.

1. In order to secure a copyright of a book or a dramatic composition, under the Revised Statutes, it is necessary not only to deposit with the librarian of Congress a printed copy of the title of the work, but the work must be published within a reasonable time after such deposit of the printed copy of the title, and two copies of the work must, within ten days from its publication, be delivered to the librarian. *Boucicault v. Hart*, 47
2. Where a printed copy of the title of a dramatic composition was deposited

- in October, 1874, and a bill was filed in February, 1875, to restrain an infringement of the copyright of the work, but the bill did not allege any publication of the work, or any delivery of copies, or any reason why the same had not been done, it was held, on demurrer, that the bill did not show that a complete copyright had been obtained. *id.*
3. The exclusive right to publicly perform a dramatic composition, under section 4966 of the Revised Statutes, is dependent upon the existence of a copyright therefor. *id.*
  4. Under section 4967 of the Revised Statutes, a person who had printed and published part of a dramatic composition, without the consent of its author, he being a citizen of the United States, and had publicly announced his intention to sell copies of the same, was restrained, by injunction, from printing or publishing the work. *id.*
  5. Where the author of a dramatic composition has not printed it, but has only permitted and procured it to be represented on the stage of a public theatre for his own benefit, and through his selected channels, he has not abandoned it or dedicated it to the public, nor has he published it, within the meaning of the provisions of the Revised Statutes in regard to copyrights. *id.*
  6. The right of an author of a dramatic composition to retain and use it for his personal benefit, without publication, is a common law right. *id.*
  7. B. took a copyright, in 1871, for the "Rules of Practice of the Supreme Court of the State of New York," and one in 1874 for the "General Rules of Practice of the Courts of Record of the State of New York." The book of 1871 contained the Rules adopted by the judges under the authority of a State statute, in 1870, with notes to each Rule, stating the substance of the decisions of the Courts in regard to such Rule, giving the volumes and pages of the reports. The book of 1874 contained like Rules adopted in 1874, with like notes. By law, the judges were required to revise the Rules every two years. M. published in 1875 a book containing the Rules adopted in 1874, with notes to each Rule, referring only to the volume and page of the reports of decisions in regard to such Rule. M., in compiling his book, copied the citations in B.'s book of 1874, and supplemented them by citations from B.'s book of 1871, and by results of his own research. In a large majority of the notes in M.'s book, the citations were the same, and placed in the same order, as in B.'s book of 1874: *Held*, that M. had infringed B.'s copyright of 1874. *Banks v. McDivitt*, 163
  8. Compilers of books which contain facts derived from common sources of information, must investigate for themselves from the original sources which are open to all persons, and cannot use the labors of a previous compiler, *animo furandi*, and the subsequent compiler cannot save his own time by copying the results of the previous compiler's study, although the same results could have been obtained by independent labor. *id.*
  9. The publication by B. of the Rules of 1874, with appropriate notes, was not the publication of a new edition of the Rules of 1871, within the statute requiring certain words in regard to the copyright to be inserted in the several copies of every edition of a copyrighted book. *id.*
  10. Where an infringement is palpable, and a provisional injunction will not be attended with serious injury, such injunction is not ordinarily refused as to so much of the work as is a plain infringement of the prior publication. *id.*
- ### CORPORATION.
1. A corporation created by the State of New York as a savings bank, and authorized to do the ordinary business of a savings bank, and also to receive on deposit, as bailee, articles of value, but having no authority to



discount commercial paper, carried on habitually the business of discounting such paper. It discounted notes made by J., who afterwards was adjudged a bankrupt. The corporation was also adjudged a bankrupt. The assignee in bankruptcy of the corporation put in against the estate of J., in bankruptcy, a proof of debt for the amount of the money paid by the corporation to J. on discounting such notes: *Held*, that such proof of debt must be expunged. *In re Jaycox*, 70

2. Not only do the statutes of New York forbid the contract and make void the notes, but the money loaned or paid on the discount of the notes cannot be recovered back by the lender. *id.*
3. The corporation retained no title to the money loaned, and its assignee in bankruptcy acquired no title to it and no right to recover it back. *id.*
4. The Legislature of Connecticut, in 1866, chartered a life insurance corporation, reserving, in the charter, a right to alter, amend or repeal it "at the pleasure of the General Assembly." A statute of the State, passed in 1871, created the office of insurance commissioner, and provided, that, if it should appear to him that the assets of any life insurance company were less than its liabilities, he might petition the proper Court of Probate to appoint a trustee to take possession of its property for the benefit of its creditors, and made it his duty to so petition if it should appear that its assets were less in amount than three-fourths of its liabilities. S., the insurance commissioner, petitioned the Probate Court, setting forth that the assets of said corporation were less than three-fourths of its liabilities, and praying for the appointment of a trustee. After a full hearing on the merits, the petition was dismissed. Thereafter, the Legislature, by a joint resolution passed at its May session, in 1875, which contained sundry recitals, resolved, that said charter should, on the 1st of September, 1875, "be and become wholly and

absolutely repealed and annulled," provided, that, if the corporation should, before said day, supply the deficiency existing in its assets, and receive from S. a certificate of a specified fact, the charter should remain in full force, and should not, by such resolution, be repealed or annulled, and provided that if S. and the corporation should disagree as to the amount of assets, their value and their sufficiency, two judges of the State Courts should determine the amount of such assets, their value and sufficiency, and certify the deficiency, if any, to be paid in, and, if the corporation should, within thirty days after the delivery of such certificate to the secretary of the corporation, pay in such deficiency, such resolution should become inoperative and void; that the decision of the judges should be made, and the certificate be delivered to the secretary, before November 1st, 1875; and that, in case the corporation and S. should disagree as to the value or sufficiency of the assets, and the corporation should not supply the deficiency on or before September 1st, 1875, S. should, on that day, take possession of all the assets, books and papers of the corporation, and hold the same "subject to the order of said Chief Judge, and to be disposed of as provided by law." A statute passed by the Legislature at the same session provided, that the title to the assets of life insurance companies, on the repeal of their charters, should vest in the insurance commissioner, who should dispose of them for the benefit of those interested in them, subject to the control of the proper State Court. The corporation did not, prior to September 1st, supply, to the satisfaction of S., the alleged deficiency, and disagreed with him in regard to the amount, value and sufficiency thereof. S. prepared to take possession of the property of the corporation, on September 1st, and prior to the investigation by the two judges. The corporation thereupon obtained an injunction *ex parte* from a State Court, to enjoin S., which, after a hearing, was, on motion of S., dissolved. S. also obtained an *ex parte* injunction from a State Court to

restrain the officers of the corporation from disposing of its assets. The plaintiffs in this suit, holders and owners of policies of insurance issued by the corporation, filed this bill against S. and the corporation, alleging its solvency, and asking an injunction against S. from taking possession of its assets, and applied for a provisional injunction to that effect: *Held*, that such injunction must be refused. *Lothrop v. Stedman*, 134

5. It should be a very clear case to justify a Court in deciding that an Act of the Legislature is invalid, on a motion for provisional injunction. *id.*
6. The principle, that a stockholder of a corporation cannot maintain a bill in equity against a wrong-doer, to prevent an injury to the corporation, unless it shall be averred, and shall affirmatively appear, that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor; and the plaintiffs are only creditors of the corporation. *id.*
7. When a charter or a general statute provides that such charter is subject to repeal by the Legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the Legislature has the right to exercise its powers summarily and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by Courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and, in such a case, a repeal, like other legislative acts which do thus violate the principles of natural justice, may be reviewed by Courts.
8. The decision of the Court of Probate did not debar the Legislature from from taking such legislative action as it deemed just. *id.*
9. A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. *id.*
10. The Legislature has the right, as an administrative measure, to appoint a trustee, to take the assets and manage the affairs of a corporation whose charter has been repealed, in conformity with the general, just rules which it has prescribed, or with the rules of a Court of equity, if no statutory provisions have been enacted. *id.*
11. The resolution of repeal, in this case, was a legislative act, declaring the repeal and not the forfeiture of the charter, and the recitals in it were not in the nature of judicial findings of fact, but the statement of the reasons which operated upon the legislative mind. *id.*
12. By the resolution, in this case, the charter was repealed, but the repeal was not to take effect, or be operative, if a specified event should thereafter take place, which event was uncertain. The designation of the two judges, to determine whether the event had taken place, was not a delegation of the power to determine whether the charter should or should not be repealed, but a delegation of the duty of ascertaining whether a fact existed, upon the existence of which the Legislature had determined that the repeal should not go into effect. *id.*
13. Even if the charter were in existence and unrepealed, the Legislature had the power to take away the custody of the assets of the corporation from its directors, and entrust the custody to an officer of the State, pending an investigation into the company's solvency, and the determination of the fact whether the event had happened on which a repeal of the charter would take place. Such power was derived from the reserved power of amending the charter at pleasure. *id.*
14. The effect of the action of the Legislature was to make S. a trustee, under the exclusive direction and control of a Court of equity, and subject to its decrees. *id.*
15. Under the statute of New York, (2 R. S., 467, 468, §§ 58 to 66,) provid-

ing for the voluntary dissolution of corporations, it is necessary, on the presentation of the petition for dissolution, that an order should be entered calling on all persons interested, to show cause against the prayer of the petition at a time not less than three months from the date of the order. If this be not done, the proceedings are invalid. *Freeman's Bank v. Smith*, 220

See BANKRUPTCY, 8 to 10.  
JURISDICTION.  
MUNICIPAL CORPORATION.

### COUPON.

1. The holder of a coupon payable to bearer is not an assignee of the cause of action, within the 1st section of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) *Cooper v. Town of Thompson*, 434
2. A coupon payable to bearer is a promissory note negotiable by the law merchant, within said 1st section. *id.*

See MUNICIPAL CORPORATION, 1 to 4, 11 to 17.

### CRIMINAL LAW.

1. A defendant in an indictment moved to set aside a forfeiture of a recognizance given by him for his appearance to answer the indictment, on the ground of irregularities as to the time and place of calling him to appear, and of entering the forfeiture. He had absconded to avoid a trial on the indictment, and was a fugitive from justice: *Held*, that the motion must, for that reason, be denied. *United States v. Stien*, 127
2. Under § 1 of the Act of April 5th, 1866, (14 *U. S. Stat. at Large*, 12,) now § 5418 of the Revised Statutes of the United States, which provides a penalty for the forging of "any bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States," the words "other

writing" includes an owner's oath required to be taken before making an entry of goods at the custom house, and an import entry, and an importer's bond. *United States v. Lawrence*, 211

3. The fact that § 8 of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 739,) now § 5445 of the Revised Statutes of the United States, punishes as a misdemeanor all acts done in effecting an entry of goods, furnishes no reason why forgery of writings used in entering goods at the custom house should not be punished under § 1 of the Act of April 5th, 1866. *id.*
4. It is not necessary that an indictment founded on § 1 of the Act of 1866, and alleging the forgery of writings used in entering goods at the custom house, should allege the existence of the goods mentioned in the writings. *id.*

See EXTRADITION.  
INDICTMENT.  
TRIAL, 2.

## D

### DAMAGES.

See EVIDENCE, 9 to 14.  
PROVOST MARSHAL, 5.

### DEPOSITION.

See EVIDENCE, 8.

### DUTIES.

1. Under § 5 of the Act of March 3d, 1857, (11 *U. S. Stat. at Large*, 195), which provides that, on the entry of any goods, the decision of the collector "as to their liability to duty or exemption therefrom, shall be final and conclusive," unless the owner shall, within ten days, specify in writing the grounds of his dissatisfaction, and shall, within thirty days, appeal to the Secretary of the Treas-

- ury, and that the decision of the Secretary shall be final and conclusive, and the goods "shall be liable to duty, or exempted therefrom, accordingly," unless suit shall be brought within thirty days after his decision, such appeal is not a condition precedent to a right of action against a collector, to recover back duties illegally exacted by him, where the question is as to the rate or amount of duty, it being conceded that some duty is payable, but the statute applies only to a case where the question is whether the goods are liable to any duty or are wholly exempt from duty. *Schneider v. Barney*, 37
2. Whether, under such statute, a suit can be brought, where the Secretary of the Treasury unreasonably neglects to make and communicate a decision on an appeal, *quere*. *id*.
  3. Under the Act of February 26th, 1845, (5 *U. S. Stat. at Large*, 727,) a collector who demands and receives illegal duties, which are paid to him under protest, is liable in an action of assumpsit for the amounts thus collected by him. *id*.
  4. Under the Act of 1857, an appeal was taken to the Secretary of the Treasury from the decision of a collector as to the rate and amount of duties. On the trial of a suit against the collector to recover back the duties, the plaintiff gave evidence tending to show that he was justified in considering his appeal as having been decided against him, but the Court directed a verdict for the defendant: *Held*, that the question as to whether there was evidence of a decision by the Secretary upon the appeal, ought to have been submitted to the jury. *id*.
  5. Where, in June, 1863, the same precise question had been decided by the Secretary, on appeal, against the plaintiff, and the Secretary had published a circular to that effect, and, in September and October, 1863, the plaintiff presented the same question to the Secretary, on appeal, and, up to January, 1866, he had made no response, the plaintiff was justified in considering his appeal as having been decided against him. *id*.
  6. An action against a collector of customs, to recover back money paid as duties, and alleged to have been illegally exacted, can be brought in the Circuit Court, although the parties are residents of the same State *id*.
  7. The 8th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 210,) provides for a duty of 60 per cent. *ad valorem* on "silk veils," and for a duty of 50 per cent. *ad valorem* "on all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for." *Morrison v. Arthur*, 194
  8. The term "silk veils," in the absence of any other language in the statute, includes all veils made of silk, and the presumption is that "crape veils," being manufactured of silk, are embraced within the term "silk veils." *id*.
  9. But, if it be shown, that, in trade and commerce, "crape veils" are not "silk veils," that is, are contradistinguished from "silk veils," and are commercially known as different articles from "silk veils," and that the term "crape veil" is a distinctive term, which distinguishes the article called by that name from a "silk veil," then the term "silk veil" fails to designate a "crape veil," and "crape veils" are dutiable under the clause of the statute relating to manufactures of silk. *id*.
  10. In the tariff Acts, the article of bristles is separately classified, and is regarded as a different article from hair, and bristles are not included in the general words, "the hair of an animal." *Von Stade v. Arthur*, 251
  11. By section 18 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 216,) all goods, wares and merchandise of the growth or produce of countries east of the Cape of Good Hope, (except raw cotton,) when imported from places west of

the Cape of Good Hope, were subjected to a discriminating "duty of ten *per centum ad valorem*, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." By section 5 of the Act of June 6th, 1872, (17 *Id.* 233,) certain articles were declared to be "exempt from duty." The Act of 1872 did not have the effect to repeal the Act of 1864, so as to exempt from such discriminating duty articles falling within the description in the Act of 1864, although they were articles made exempt from duty by the Act of 1872. *Gautier v. Arthur*, 432

12. The invoice on which an entry of imported goods was made read thus:  
 "Merchandise, frs. .... 8670 25  
 Discount for cash, on gross  
 am't, 2 p. c. .... 175 80

frs. .... 8494 95  
 Terms cash; if not paid cash, interest to be added at the rate of 6 *per cent.*" The collector refused to allow the 2 *per cent.* discount, and the goods were appraised at 8670.25 francs, and duty was exacted thereon. The net invoice price was the actual market value of the goods in the country of exportation: *Held*, that the duty on the 2 *per cent.* was improperly exacted. *Goddard v. Arthur*, 438

13. The sale was, on the face of the invoice, a sale for cash at the lesser price, without credit, interest to be paid for delay. *id.*

*See* FORFEITURE.  
 INDICTMENT, 1 to 10.  
 PROTEST.

## E

### EAST RIVER BRIDGE.

*See* CONSTITUTIONAL LAW, 4 to 8.

### EQUITY.

1. A bill to prevent the publication of

a libel injurious to the plaintiff's business can be sustained only when it appears that the statement is malicious as well as false. If made to advance the party's own sales, and upon the reasonable claim that he has the right which he asserts, the action must fail. *Celluloid Mfg Co. v. Goodyear Dental Vulcanite Co.*, 375

*See* BANKRUPTCY, 4 to 7.  
 CONSTITUTIONAL LAW, 4 to 8.  
 COPYRIGHT, 4.  
 CORPORATION, 4 to 14.  
 EVIDENCE, 8.  
 JURISDICTION, 1, 2.  
 MUNICIPAL CORPORATION, 5.  
 PATENT, 4 to 9, 16, 18, 23 to 26, 35, 42 to 50.  
 PLEADING, 1.  
 PRACTICE, 1, 7.

### ESTOPPEL.

*See* PARTY, 2.  
 PATENT, 42.

### EVIDENCE.

1. S. delivered at New York, to the purser of a steamer about to sail from there to France, a package of jewelry, corded and sealed, and addressed to L. at Paris, France. An officer of the customs obtained the package from the hands of the purser, on board of the vessel, at New York, and made seizure of its contents as forfeited, for having been landed at New York, from a vessel which brought them from Havana, without a permit from the collector. Suit was brought against the diamonds, as forfeited. L. put in a claim to the goods, by S. as his agent, the claim being verified by S. At the trial, evidence was offered, on the part of the United States, of admissions made by S., after the seizure, to the effect that the goods had been left with him by L., their owner, for sale, that L. had brought them from Havana, and that S. had been unable to sell them, and was now returning them to their owner in France, but the evidence was excluded: *Held*, that the evidence was

- properly excluded. *United States v. A Lot of Jewelry*, 60
2. While S. had the goods in his possession, such declarations respecting their ownership and his authority to dispose of them, were competent evidence. *id.*
  3. Statements made by S. after he gave the goods to the purser, were narrative or historical. *id.*
  4. Declarations by S., while in possession of the goods, in derogation of the title of L., were not competent evidence. *id.*
  5. Under § 3082 of the Revised Statutes, possession of goods is not sufficient evidence to authorize conviction, until it is otherwise proved that the goods were imported contrary to law. *id.*
  6. The written declaration of a trustee, in a conveyance to a third person, of property which had been previously conveyed to the trustee by his *cestui que trust*, cannot be used against the latter, to determine the intent of both parties in making the original conveyance, and to show the extent of the interest which the *cestui que trust* intended to convey thereby. *Waterman v. Wallace*, 128
  7. On the trial of a civil action by the United States against the sureties on the official bond of an assistant paymaster in the army, it is erroneous to allow evidence to be given by the defendants of the general conduct of the officer in the discharge of his official duties, and of his mode of life and pecuniary circumstances, even though he is dead. *United States v. Wood*, 252
  8. B. brought a suit in equity in this Court against C. and others, and in it took the deposition of one I., as a witness. B. then discontinued the suit, and afterwards brought another suit in equity against the same defendants, in this Court, for the same cause of action. No proofs were taken in it by either party, and, after it had been set down for hearing, by the consent of both parties, the defendants applied for an order to permit them to read, as testimony, the deposition of I., so taken in the former suit. It was not shown that I. was dead, or that there was anything to prevent his being examined in the usual way: *Held*, that the application must be refused. *Brewer v. Caldwell*, 361
  9. In the trial before a jury, of an action at law to recover damages for the loss of the plaintiff's canal-boat, through the negligence of the defendant, while being towed by the defendant, the boat, which was loaded with coal, having struck the spiles of a bridge and sunk, the plaintiff, on being examined as a witness, testified, under objection, that he afterwards had a conversation with a person who was the agent of the defendant in regard to tow-boats, and he said that the boat was sunk, and that it would cost more to raise her than she was worth, and that he regarded her as a total loss: *Held*, that the evidence was competent. *Dowdall v. The Pennsylvania Railroad Co.*, 403
  10. The statement was within the scope of his agency, there had been time for the agent to make an examination, and it is to be assumed that he had made one; nor was it a subject in relation to which it was necessary to be shown that the person speaking was an expert. *id.*
  11. A party claiming a total loss of his vessel must prove either an actual total loss, or that it would cost more to raise and repair the vessel than she would be worth when repaired. The burden of proof is upon him. *id.*
  12. The facts, that the boat was struck, and filled and sank to the bottom of a river in which the tide ebbed and flowed, and that, after the lapse of sufficient time to ascertain the facts, the agent of the party causing the injury declared to the owner that she was a total loss, and that it would cost more to repair her than she would be worth when repaired, were-

evidence to justify a submission of the question to the jury. *id.*

13. The fact that the boat was proved to have been subsequently seen lying in the harbor of New York, slightly repaired and lying in the mud, did not necessarily alter the result. The whole evidence was proper for the jury. *id.*

14. On the question of the actual market value of the boat at the time of her loss, it was competent evidence for the plaintiff to testify as to what he had paid for her and what he had expended upon her. *id.*

*See* BANKRUPTCY, 1, 6, 16.  
DUTIES, 4, 5.  
INDICTMENT, 17.  
NEW TRIAL.  
SURETY.

## EXECUTOR.

*See* PATENT, 12.

## EXTRADITION.

1. L., to an indictment for forgery, pleaded want of jurisdiction in the Court, setting up that he was arrested in Ireland, upon a requisition made by the United States, and was charged with the crimes of forging and uttering a bond and affidavit; that, in pursuance of the British extradition Act of August 9th, 1870, (33 & 34 *Vict.*, *ch.* 52,) by arrangement between the United States and Great Britain, it was agreed, in respect to his surrender, that he should not, until he had been restored, or had an opportunity of returning, to the British dominions, be detained or tried within the United States for any offence committed prior to his surrender, other than the extradition crimes of forging and uttering said bond and affidavit; that, on the faith of said agreement, he was conveyed within the United States, under an extradition warrant which recited that he was accused of said crimes; that he is subject to be tried for said

crimes, and for none other; that the President had directed the district attorney to proceed against him on no charges except those on which he was extradited; that the offences in the indictment are not those on which his surrender was grounded, and not those specified in the said warrant; that he has been held in custody for the crimes specified in said warrant, but was not tried for either of them; and that the Court has no jurisdiction to try the indictment, until a reasonable time shall have elapsed, after his trial for crimes specified in said warrant, that he may have an opportunity to return to the British dominions. To this plea there was a replication; to the replication there was a rejoinder; and to the rejoinder there was a general demurrer: *Held*,

(1.) In a criminal case, on a demurrer to a pleading, judgment is to be given against the party who has committed the first fault in pleading;

(2.) Extradition proceedings do not, by their nature, secure to the person surrendered, immunity from prosecution for offences other than the one upon which the surrender was made;

(3.) There is no provision in the treaty between the United States and Great Britain, of August 9th, 1842, (8 *U. S. Stat. at Large*, 572,) which confers such immunity; nor is it conferred by the Act of August 12th, 1848, (9 *U. S. Stat. at Large*, 302,) or by the Act of March 3d, 1869, (15 *Id.*, 337;)

(4.) The British extradition Act of August 9th, 1870, (33 & 34 *Vict.*, *ch.* 52,) has no binding force on the Courts of the United States, in regard to the construction of the treaty of 1842;

(5.) It does not appear that the Executive Department of either the United States or Great Britain has construed the treaty of 1842 as conferring such immunity;

(6.) No order of the President can have any legal effect to restrict or enlarge the jurisdiction conferred by law on the Courts;

(7.) The agreement set up in the plea is of no avail as an objection to the jurisdiction of the Court. *United States v. Lawrence*, 295

## F

## FEES.

See MARSHAL.

## FORFEITURE.

1. Imported goods were seized by a collector of customs, as forfeited to the United States for undervaluation. Their appraised value exceeded by more than 10 per cent. their entered value, and they thereby became liable to 20 per cent. additional duty. They were proceeded against and taken into custody by the marshal, under process. Under proceedings for a remission of the forfeiture, the Secretary of the Treasury remitted it, on condition that the importer should pay the costs and the duties on the goods, if they were due, or give bond to export the goods. He elected to give bond, but the collector refused to permit the goods to be delivered until the importer had paid the 20 per cent. additional duty. He paid it and brought this suit to recover it back: *Held*, that the exaction was illegal, and that the plaintiff was entitled to recover. *Murray v. Arthur*, 429
2. Where a forfeiture is remitted by the Secretary of the Treasury, pursuant to the statute authorizing him to do so, the cause of forfeiture is released. *id.*
3. A fulfilment of the conditions imposed in a warrant remitting a forfeiture is equivalent to a satisfaction of the cause of action which constituted the ground of seizure. *id.*

## FORGERY.

See CRIMINAL LAW, 2 to 4.

## FRAUDULENT REGISTRY.

See INDICTMENT, 13.

## H

## HABEAS CORPUS.

See BANKRUPTCY, 11.

## I

## INDICTMENT.

1. Section 4 of the Act of July 18th, 1866, (14 U. S. Stat. at Large, 179,) reproduced in § 3082 of the Revised Statutes, provides, that, "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law," "the offender shall be fined," &c. An indictment founded on this section described the merchandise as "certain goods, wares and merchandise, to wit, a large quantity of silk goods, to wit, six cases containing silk goods, of the value of \$30,000, a more particular description of which is to the jurors unknown," and stated that the goods were dutiable goods introduced into the port of New York from France: *Held*, that the indictment was not open to the objection, that the goods were not sufficiently identified, and the description of them not sufficient to enable the defendant to prepare his defence. *United States v. Clafin*, 178
2. It is not necessary to describe property in an indictment with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy. *id.*
3. A reasonable amount of detail in describing property is all that is necessary in an indictment, and, if more detail is required, a bill of particulars may be demanded. *id.*
4. An indictment under the said section need not set out the offence committed in the original importation, with the same particularity of time, place and circumstances that would be required in an indictment for the original offence. *id.*
5. Whether the said section applies to



- any other case than that of smuggled goods, *quere*. *id.*
6. The indictment having alleged that the illegality in the original importation of the goods was, that they had been "smuggled and clandestinely introduced into the United States," the charge must be confined to such illegality. *id.*
  7. The averment that the goods were smuggled and clandestinely introduced into the port of New York from the Republic of France is a sufficient averment to enable the Court to say that the original importation was illegal, within the meaning of the statute. *id.*
  8. The meaning of the word "smuggle," defined. *id.*
  9. When technical words are used in an indictment, they must be taken to be intended to have their technical meaning. *id.*
  10. In an indictment under the said 4th section of the Act of 1866, it is not a sufficient designation of the illegality of the original importation, to say, merely, that the goods had been imported and brought into the United States contrary to law. *id.*
  11. A person was indicted by the name of D. K. Olney Winter. He moved to quash the indictment, on the ground that he was not described therein by any Christian name: *Held*, that the motion must be denied. *United States v. Winter*, 276
  12. When a person has selected a particular given name as the only given name by which he will be known, such given name becomes part of his legal name, and he is properly described by that name in an indictment, whether it stands first, or second, or third, in the order of his given names. *id.*
  13. An indictment under § 5512 of the Revised Statutes, for fraudulent registration, alleged, in one count, that the defendant, "having no lawful right to register, fraudulently and wilfully did register," and, in another count, "that he had no lawful right to register, as he well knew, by reason of the fact that he was then and there an alien, and had not been admitted to become a citizen of the United States:" *Held*, that the indictment was bad, in not pointing out the fraud, and in omitting to state facts showing that the defendant was not entitled to register; and that the averment that the accused was an alien and had not been admitted to become a citizen of the United States, did not show that he had no right to register, or that he was not a citizen of the United States, or that he had no right to vote. *United States v. Hirschfield*, 330
  14. An indictment, under § 5467 of the Revised Statutes, against an employee in a post office, for stealing money from a letter, did not aver that the letter was one intended to be conveyed by mail, or that it had been deposited in any post office, or in the charge of the defendant, or that it came into his possession in the regular course of his official duty: *Held*, that the indictment was bad. *United States v. Winter*, 333
  15. Under section 5467 of the Revised Statutes, an indictment against a letter-carrier for embezzling a letter entrusted to him as a carrier, to be carried and delivered by him, is not defective, although it does not aver that the letter had not been delivered to the party to whom it was directed. *United States v. Jenther*, 335
  16. That section creates, first, offences appertaining to letters, and, next, offences appertaining to the contents of letters, and then contains this proviso: "and provided the same shall not have been delivered to the party to whom it is directed." *Semble*, that such proviso does not apply to the first class of offences. If, however, it does, it is for the accused to prove the delivery, as a defence. *id.*
  17. An indictment under said section described the letter embezzled thus: "a letter enclosed in an envelope, addressed and directed as follows,

that is to say, to M. D., No. 122 W. 26 St., a more particular description of the manner in which said envelope was directed being to the jurors unknown,\* said envelope having been destroyed:" *Held*, that it was competent to give evidence relating to a letter contained in an envelope directed "M. D., No. 122 W. 26th Street," the word *to* and the abbreviation *St.* not being on the envelope, the variances not being material.

*id.*

18. On a motion by the defendant for a new trial on an indictment, on the ground that the evidence failed to sustain a particular allegation in the indictment, it ought to appear that the objection was made at the trial in a manner sufficiently formal to attract attention. *id.*

19. In an indictment under § 3893 of the Revised Statutes, charging the defendant with depositing in the mail an obscene pamphlet, and also with depositing in the mail a notice giving information how an article designed for the prevention of conception can be obtained, it is not necessary or proper that the indictment should give a definite or detailed description of the pamphlet. *United States v. Foote*, 418

20. Sufficient information as to the particular article about which evidence is to be given can be obtained by an order for a bill of particulars, and for the exhibition to the defendant of the article itself. *id.*

21. A notice in the form of a letter enclosed in a sealed envelope, if it gives the prohibited information, is within the scope of the statute. *id.*

22. A written slip of paper, without address or signature, giving the prohibited information, is a "notice," within the meaning of the statute, although not volunteered, but sent in reply to a letter asking for the information. *id.*

*See CRIMINAL LAW*, 1, 4.

## INJUNCTION.

*See* CONSTITUTIONAL LAW, 4 to 8.  
COPYRIGHT, 4, 10.  
CORPORATION, 4 to 14.  
PATENT, 16, 22 to 26, 35.  
TAXES, 2, 3.  
TRADE-MARK, 1, 2, 6, 7.

## INSURANCE.

*See* LIFE INSURANCE.

## INTERNAL REVENUE.

1. Under § 127 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 287,) where, under the will of a testator who died before the Act was passed, a person became beneficially entitled in possession, after the Act was passed, to real estate, upon the death of another person who died after the Act was passed, and who had by such will a life estate in such real estate: *Held*, that such beneficial interest in possession was a "succession" conferred by such will, and was subject, under § 133 of said Act, to a succession tax. *Wright v. Blakeslee*, 419

## J

### JUDGE.

1. The question of the liability of a judge to respond in damages, for his judicial acts, to an aggrieved party, considered. *Lange v. Benedict*, 546

### JUDGMENT.

1. Under section 967 of the Revised Statutes of the United States, which provides, that "judgments and decrees rendered in a Circuit or District Court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the Courts of such State cease, by law, to be liens thereon,"

the Courts of the United States, in the State of New York, are not vested with the discretionary power which the State Courts of New York have, under section 282 of the Code of Procedure of New York, to order real property bound by the lien of a judgment to be exempted from such lien, in certain cases, during the pendency of an appeal from such judgment. *Myers v. Tyson*, 242

4. A Circuit Court has no power to administer common law relief in a suit between citizens of the same State. *Boucicault v. Hart*, 47

See CONSTITUTIONAL LAW, 4.  
CORPORATION, 7.  
COUPON.  
DUTIES, 6.  
EXTRADITION.  
PARTY, 1.

## JURISDICTION.

1. M., a copartner with D., filed a bill against D. for a dissolution of the copartnership, and an account. The firm had a contract with the S. Co., a corporation, in regard to the furnishing by it to the firm of marble. A receiver of the copartnership property was appointed. Afterwards, M. filed an amendment and supplement to the bill, alleging a secret agreement by D. with the S. Co., in fraud of the rights of M. under said contract, and the refusal of the S. Co. to furnish marble to the receiver, and making the S. Co. a defendant, and praying a specific performance of said contract by it. M. was a citizen of Ohio. The bill alleged that the S. Co. was a citizen of Vermont. The S. Co. interposed a plea to the jurisdiction of the Court over it, alleging that it was a corporation created by Massachusetts. Issue was joined on the plea, and proofs were taken, and the cause was heard thereon, as to the S. Co.: *Held*, that the Court had no jurisdiction of the suit as to the S. Co. *Myers v. Dorr*, 22
2. As to the S. Co. the amended and supplemental bill is an original bill. *id.*
3. A corporation can have no citizenship or inhabitancy out of the State by which it was created, and, under § 11 of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 78,) cannot be made a party to a civil suit, in a Circuit or District Court, by original process, in any other District than a District of the State by which it was created. *id.*

## JURY.

1. Section 804 of the Revised Statutes provides, that, when the panel is exhausted, the marshal, by the order of the Court, shall return jurymen from the bystanders, sufficient to complete the panel. Under such an order, the marshal summoned as jurymen persons who were not in the Court room, or about the Court house, when such order was made, or when they were summoned, but they were present in Court when they were returned by the marshal as present, and when their names were placed on the panel and their ballots placed in the wheel: *Held*, that they became bystanders, within the meaning of the statute, when they attended. *United States v. Loughery*, 267
2. *Held*, also, that such objection should have been taken as a ground of challenge to the array, before the polls were drawn, and that it was too late to challenge the array after challenging the polls. *id.*

See TRIAL, 1.

## L

LACHES.

See ADMIRALTY, 5.

## LEGISLATURE.

See CORPORATION, 4 to 14.

## LEX LOCI.

See BANK, 3.

## LIEN.

1. Where supplies are furnished to a vessel in a foreign port, on the order of a person who is in the actual command and possession of her, as master, by a person who has no notice of any circumstances to raise a suspicion as to the authority of such master, a lien on the vessel is created, even as against a former owner of the vessel who claims that she was sold in fraud of his rights, and that the purchaser at such sale placed such master in command of her. *The Sarah Harris*, 508

2. A New Jersey corporation owned a steamboat which was enrolled in the port of New York. She ran as a passenger boat between the city of New York and Long Branch, in New Jersey, making several trips a day each way. Supplies of food were furnished to her in New York, on her credit, such supplies not being absolutely necessary for the passengers or crew, but being useful and convenient. Some of the food was consumed by the employees of the vessel, but the larger part was dispensed at a restaurant on board, to passengers, who paid for what they ordered: *Held*,

(1.) The enrolment of the vessel at New York did not make her a domestic vessel there, but she was a vessel in a foreign port, while in New York, because her owner did not reside at New York;

(2.) There was sufficient necessity for the supplies to furnish a basis for a lien on the vessel, and the fact that they were dispensed to passengers from a restaurant furnishes no ground for alleging that such necessity did not exist;

(3.) A lien on the vessel for such supplies was created. *The Plymouth Rock*, 505

See BANKRUPTCY, 18 to 25.  
JUDGMENT.  
WHARFAGE.

## LIFE INSURANCE.

1. A policy of life insurance by a company, on the life of S., declared that it was issued and accepted upon the express conditions, that it "shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured; that no premium, or instalment of premium, hereon, shall be considered as paid, unless a receipt shall have been given therefor at the time of payment, duly signed by the president or secretary of said company; that no agent of the company shall make any contract binding the company, nor alter or change any condition of the policy, nor waive forfeiture of this policy." The policy was put into the hands of S., by an agent of the company, who informed S., at the time, that there was no hurry about his paying the premium. Thereafter, S. died, still retaining the policy, but without having paid the premium, and without any receipt for the premium having been given to him: *Held*,

(1.) It is to be inferred, from the fact that S. retained the policy, without objection, that he accepted its terms and provisions;

(2.) The premium was not paid, as between S. and the company;

(3.) The agent attempted to give a credit to S. for the amount of the premium, in violation of the conditions of the policy;

(4.) The attempted waiver by the agent was not effectual, and the policy never took effect. *Davis v. Massachusetts Mutual Life Ins. Co.*, 462

## M

## MARRIED WOMAN.

1. A woman married in Connecticut, in 1864, executed there, in 1868, a promissory note, which was made and signed by her alone. The consideration for the note was the sale to her, by the payee, of some shares of stock in a corporation. At the time of her marriage she had real

and personal property, part of the latter consisting in stocks of corporations, some of which were sold after her marriage, and the proceeds were reinvested in other stocks, both before and after the note was executed, so that the value of the property was not diminished. The shares of stock purchased or subscribed for were issued to her in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney. There was no settlement to her separate use of the property she owned at her marriage, nor had any of her after-acquired property been conveyed to her in consideration of her personal services during coverture. In a suit at law brought against her to recover the amount of the note: *Held*, that, at the time of the execution of the note, she had separate property, under the statutory system of Connecticut in regard to the property of married women, which was intended to be, and was, bound by her contract, and that the plaintiff was entitled to recover. *Williams v. King*, 282

2. Under an Act passed in Connecticut, in 1872, a married woman may be sued at law for a cause of action on which she would previously have been liable in equity. *id.*
3. Where a married woman who has a separate estate enters into a contract for its benefit, or for her exclusive benefit, it will be presumed that such contract was made upon the credit of her estate. *id.*
4. A debt contracted for the purchase of property which goes into the actual or constructive possession of the purchaser, is a debt contracted for the benefit of his estate. *id.*
5. The statute of Connecticut in regard to the personal property of married women, construed. *id.*
6. Whether real estate in Connecticut, conveyed to a married woman without words indicating that it was conveyed to her sole use, is to be

considered as her separate estate. *quere. id.*

*See* PARTY, 2.

### MARSHAL.

1. Under § 829 of the Revised Statutes, which provides, that, "when the debt or claim in Admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission," the marshal is entitled to such commission, in a suit *in rem*, against a vessel, if process is issued, and a bond to the marshal is given under the Act of March 3d, 1847, (9 *U. S. Stat. at Large*, 181,) (now § 941 of the Revised Statutes.) although the service of the process is waived, and the vessel is not actually seized under the process, *The City of Washington*, 410
2. Under said § 829, where the amount of a final decree is paid before execution, the debt or claim is "settled." *id.*

### MASTER.

*See* LIEN, 1.

### MORTGAGE.

1. In directing the order of distribution, in a foreclosure suit, of the proceeds of the sale of the road and other property of a railroad corporation, mortgaged by it to trustees to secure the principal and interest due on registered and coupon bonds, it was provided, that unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest had been paid, should be paid before coupons or interest falling due at a later period, and before the principal of any of the bonds; and that coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds. *Stevens v. N. Y. & Oswego Midland R. R. Co.*, 412
2. The mortgage provided, that, after default, the mortgagees should sell

so much of the mortgaged property as should "be necessary to pay and discharge the principal and interest, according to the tenor thereof," of all the bonds issued, and there was no provision in the mortgage for a *pro rata* dividend of the proceeds of sale among all the bonds and their accrued interest. *id.*

See ADMIRALTY, 5.  
BANKRUPTCY, 18 to 25.

### MUNICIPAL CORPORATION.

1. A statute of New York which authorized a town to loan its credit in aid of a railroad corporation, by issuing its bonds, prohibited the making of the loan except on the condition that the written consent of a majority of the taxpayers, representing a majority of the taxable property of the town, should first be duly acknowledged and recorded, together with a copy of the assessment roll of the town, in the office of the county clerk, and it made such record evidence, in any Court, of the facts therein recited. The requisite number of consents were not obtained, and no consents were recorded in the clerk's office. Coupon bonds were, nevertheless, issued by commissioners specially charged by the statute with that duty, and the bonds recited that they were issued pursuant to law. In a suit against the town, to recover the amount of unpaid coupons, which, with the bonds with which they were issued, were purchased by the plaintiff's assignor, in good faith, before such coupons matured: *Held*,

(1.) That the plaintiff need not prove that the bonds were issued in compliance with the conditions and limitations imposed by the statute.

(2.) That the right to recover could not be defeated by proof that such conditions and limitations were not complied with. *Miller v. Town of Berlin*, 245

2. When a municipal corporation has power, under any circumstances, to issue negotiable securities, a *bona fide* holder of them has a right to presume that they were issued under the

circumstances which gave the requisite authority. *id.*

3. A *bona fide* purchaser of such bonds is not bound to look further, when they, on their face, import a compliance with the law under which they were issued. *id.*

4. There is no distinction, in this respect, between bonds issued by officers of the municipality having general powers to represent it in its fiscal transactions, and bonds issued by officers acting under a special power in the particular transaction. *id.*

5. A street 50 feet in width was laid out by the proper authority through the land of C., and the damages to C. were assessed. Such damages included remuneration for the land taken, for the deprivation of any right or privilege attached to it, and for the damage done by the lay out to the land connected with that which was covered by the street. A street of 50 feet in width was a fit and proper width for the public necessities at the *locus in quo*, the grade was a proper grade, and too much earth was not excavated. But, the public officers charged with doing the work cut the land at the extreme sides of the street perpendicularly, in a manner which would cause the adjoining land of C. to cave into the street, and subject him to expense and damage. On a bill filed by C. to restrain such officers from excavating in such manner, on the ground that they were doing the work without reasonable care, because they were not either providing a proper slope in the 50 feet width, or building a retaining wall in such width at their own expense: *Held*, that they had the right to excavate in such manner. *Cheever v. Shedd*, 258

6. In the absence of statutory provisions, a municipal corporation or its agents are not liable for the consequential damage which is necessarily done, in the exercise of reasonable care, to adjoining land not taken for public use, in the execution of a public work imposed by the Legislature

- upon the corporation, for the public benefit. *id.*
7. A municipal corporation may grade and change the grade of streets, from time to time, when it is necessary so to do, without protecting the earth or embankments of the adjoining proprietors, and is not liable for the consequential damage caused to them in adapting their land to the grade and protecting it. *id.*
  8. A municipal corporation is not liable to an injured party, for the negligence of its mayor and its police officers, who have sufficient power and ability to preserve the peace and protect property, in not discharging the duty of protecting private property against a known violation of law. *Hart v. City of Bridgeport*, 289
  9. The distinction pointed out between the public, governmental duties of a municipal corporation and its private or corporate duties. *id.*
  10. A municipal corporation is not liable for the unlawful acts of its officers, committed *ultra vires*, and not *colore officii*, in the known and wilful violation of law. *id.*
  11. By a statute of New York, the county judge was authorized, on a petition by a specified number of tax-payers, to ascertain, by judicial inquiry, whether the majority of the tax-payers of a town, in number and in taxable property, desired the town to issue its bonds in aid of a railroad company, and, if he ascertained such to be the case, he was authorized to appoint three commissioners to execute and issue bonds in behalf of the town, and invest them in the stock or bonds of the company. On a petition and proofs, the county judge adjudged that the bonds should be issued by a town, and appointed commissioners to do so. Opposing tax-payers obtained a writ of *certiorari* for the review by the Supreme Court of the State of the decision of the county judge. After the writ had been issued, and the commissioners and the company had had notice of it, they executed the bonds and delivered them to the company. The Supreme Court reversed the judgment. The bonds had interest coupons, and B. subsequently brought suit against the town on some of the coupons. It did not appear how he acquired title to the coupons, or whether he ever owned the bonds to which the coupons belonged, although it appeared that he had the coupons in his possession before they fell due: *Held*, that he was not entitled to recover. *Bailey v. Town of Lansing*, 424
  12. The issue of the *certiorari* suspended the operation of the judgment, and the company acquired no title to the bonds, which they could enforce as against the town. *id.*
  13. It appearing that the bonds were issued in fraud of the rights of the town, the burden was upon B. to show that he was a purchaser of the coupons in good faith and for value. *id.*
  14. But, certain of the bonds, with their coupons, having come into the hands of E., as a holder of them for value, before maturity, and then having passed to S., it was *held*, that S. was entitled to recover in a suit on some of such coupons, against the town. *id.*
  15. Various defences overruled, as against S., as a *bona fide* holder. *id.*
  16. The reversal of the judgment of the county judge could not invalidate the title of a *bona fide* purchaser. *id.*
  17. A statute validated the action of commissioners in issuing the bonds of a town in aid of a railroad company, and in exchanging them for the stock of the company, and declared that no bonds held by any person "in good faith or for a valuable consideration," should be void or voidable by reason of any defect or omission in the consents of the tax-payers, but that the bonds should be as valid as if such defect or omission had not occurred, provided that any exchange of the bonds for such stock was made at the par value of

the bonds. Certain of the bonds had been exchanged for stock of the company at par value. Afterwards they were sold at a discount to A., who sold them to T. He owned them when the legalizing Act was passed, and subsequently detached certain coupons from them, and sold such coupons to C. In a suit by C., to recover the amount of such coupons, against the town: *Held*,

(1.) The Legislature had power to validate the bonds;

(2.) The fact that the bonds stated, upon their face, that they were issued in exchange for stock, while the original statute only authorized them to be negotiated for cash and at par value, did not affect the position of C., as a holder in good faith, of the coupons, he being a purchaser of them for value, nor was such position affected by the fact that C., when he bought the coupons, was aware that the town contested its liability upon the bonds;

(3.) The legalizing Act validated all bonds that were originally exchanged at par value for the stock, unless the subsequent purchaser of them had notice of the illegality in their issue, and did not part with value on his purchase. *Cooper v. Town of Thompson*, 434

See CONSTITUTIONAL LAW, 4.

## N

### NAVIGATION.

See COLLISION.

### NEW TRIAL.

1. A paymaster in the army speculated in stocks, employing the defendants as his brokers. To make good his losses, and pay his obligations to the defendants, he embezzled funds of the United States, intrusted to him, and remitted to the defendants at least \$358,000 of Government funds, of which sum at least \$93,000 had been sent in his official checks upon the assistant treasurer of the United

States, in the city of New York, payable to the order of the defendants, and the residue in currency, or in checks on private bankers or on national banks. This suit was brought to recover the amount so received by the defendants, on the ground that they knew that the money was the money of the Government, and had been improperly used, or that they received the money with notice of facts from which they could only properly infer that the paymaster was unlawfully expending the funds of the Government in payment of his private debts. The jury found for the defendants. On a motion for a new trial, made by the plaintiffs, on the ground that the verdict was so against the evidence, or against the weight of evidence, that it was apparent that the jury were influenced by mistake, sympathy or prejudice: *Held*, that the motion must be granted. *United States v. Polhamus*, 200

2. The motion would not be granted if the claim were solely for the amount sent otherwise than in official checks. *id.*
3. The jury were properly charged, that, where a trustee delivers, in payment of his individual debt, property which is stamped with the insignia of ownership as trustee, the creditor takes the property with notice of the trust, and at his peril, if he does not make suitable inquiry as to the right of the trustee thus to dispose of the property. *id.*
4. The defendants, in explanation, gave evidence that their business was large, and that their time was so engrossed that they could not examine checks, and that they endorsed checks without looking at the face of the check, and that, therefore, they did not know that these were sub-treasury checks. The Court was of opinion that the case, so far as it concerned such checks, turned, in the minds of the jury, on such evidence, and that the magnitude of the amount involved in the suit, and the serious detriment which would accrue to the defendants from a verdict against them, while such a verdict would be



of very slight value to the plaintiffs, in consequence of the insolvency of the defendants, had some influence on the minds of the jury. *id.*

*See* INDICTMENT, 18.

# NUISANCE.

*See* CONSTITUTIONAL LAW, 4 to 8.

# P

# PARTNERSHIP.

*See* TRADE-MARK, 5.

# PARTY.

1. One who purchases *pendente lite* the interest of a defendant in the subject-matter of a suit, does not thereby become a necessary party to the suit; and, if the Court has no jurisdiction of him, he cannot be compelled to come in as a party. *Myers v. Dorr*, 22

2. A canal-boat, wholly owned by a married woman, was injured in a collision with a steamtug. Her husband filed a libel *in rem*, in his own name, as owner, against the tug, to recover the damages sustained. At the time of the collision, and thereafter, the libellant and his wife resided in New York. On the trial, the wife testified as a witness for the libellant, and gave material evidence to sustain his claim for damages. It was shown that, in fact, the action was brought by and with the assent of the wife: *Held*, that the wife would be equitably estopped from bringing another suit, and that this suit could be maintained. *The Tillie*, 514

*See* JURISDICTION, 3.  
PRACTICE, 1.

# PATENT.

1. Patents Generally, (1 to 9.)
2. Invention.
3. Novelty, (10.)

4. Abandonment, (11.)
5. Specification.
6. Assignment, (12 to 15.)
7. License.
8. Reissue, (16.)
9. Extension, (17.)
10. Infringement, (18 to 21.)
11. Injunction, (22 to 26.)
12. Particular Patents.
  - (1.) Stover—Planing machine, (27 to 31.)
  - (2.) Boomer and Boschert—Cheese press, (32 to 35.)
  - (3.) Carstaedt—Loom, (36 to 41.)
  - (4.) Arnold—Ruffle, (42 to 50.)
  - (5.) Mulford and others—Chain, (51 to 54.)
  - (6.) Decker—Billiard table cushion, (55 to 57.)
  - (7.) Green—Driven well, (58 to 64.)
  - (8.) Earle—Steam gauge cock, (65 to 68.)
  - (9.) Weston—Pulley block, (69.)

## 1. Patents Generally.

1. English letters patent were granted to W., April 25th, 1859, and published October 22d, 1859. He applied for a patent in the United States, for the same invention, in 1866, and it was granted to him August 6th, 1867: *Held*, that the latter patent would expire October 22d, 1876, 17 years from the publication of the English patent, and not before. *Weston v. White*, 364
2. The effect of the 16th and 17th sections of the Act of March 2d, 1861, (12 *U. S. Stat. at Large*, 249,) upon the 6th section of the Act of March 3d, 1839, (5 *Id.*, 354,) was to give to an American patent a duration of 17 years from the date of a foreign patent previously granted to the patentee for the same invention. *id.*
3. The fact that a patent has been issued by the United States for an invention, does not, of itself, prove the introduction of the invention into public and common use in the United States. *id.*
4. The owner of a useful invention has the right to sell it to all who will purchase, subject only to restraint

from some party having a conflicting patent. He holds the right from the general law of the land, and needs no Act of Congress to enable him to make or vend his article, and obtains no such right from Congress. He obtains from the patent laws only the power to restrain another from unlawfully making, using or vending his invention. *Celluloid Mfg Co. v. Goodyear Dental Vulcanite Co.*, 375

5. Injuries to the trade or profits or business of a manufacturer do not fall within the preventive scope of the patent laws, but only injuries to the right of the patentee to exclude others from the manufacture, use, or sale of the article for which he has a patent. *id.*

6. A junior private patentee, who alleges that his patent does not conflict with a prior patent, and asks the Court so to adjudge, cannot sustain a bill asking the Court to decide that the plaintiff and his licensees are not infringers of the defendant's patent. *id.*

7. A suit in effect to limit a patent, or to declare that it does not extend to a certain class of cases, and, *pro tanto*, to have it adjudged void, can only be sustained by the Attorney General, in behalf of the United States. *id.*

8. A patentee has the right to sue any one of several alleged infringers of the patent, and to omit others, in his discretion. He cannot be compelled to enforce his right, against his wish. *id.*

9. A junior patentee or an alleged infringer cannot reverse this position, and, by making the elder patentee a defendant, compel him to assert his rights as against him. *id.*

## 2. Invention.

*See* 39, 51, 52.

## 3. Novelty.

10. A chance operation of a principle, unrecognized by any one at the time, and from which no information of its

existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by putting it to a practical and intelligent use, first makes it available to man. *Andrews v. Carman*. 307

*See* 11, 31, 38, 51, 52, 55 to 57, 61, 67.

## 4. Abandonment.

11. In December, 1859, W. filed a caveat, which, by renewal, was in force until December, 1861. In January, 1861, D. obtained a patent for the same invention, W. not having been notified of D.'s application. In December, 1861, W. applied for a patent, which was rejected because of D.'s patent. In July, 1862, W., who had been in England since 1858, first heard of such rejection. In July, 1863, his attorneys, who were also D.'s attorneys, obtained a declaration of interference, but gave no notice of it to W., and the matter was decided in favor of D., by default, but W. was not notified of the result. In July, 1865, such attorneys applied for a second interference, which was declared in November, 1865. In July, 1866, W. returned from abroad, and employed other counsel, but no testimony was taken on the part of W., and the matter was decided in favor of D., by default. In October, 1866, W. withdrew his application of December, 1861, with the intention and for the purpose of filing a new application, which was done in December, 1866. In January, 1867, a new interference was declared, which, in June, 1867, was decided in favor of W. When the first two interferences were applied for W. was detained in England by a writ of *ne exeat*, and was not aware that his attorneys were D.'s attorneys. Articles containing the patented invention were made and sold by others than W. in 1863, 1864 and 1865: *Held*, that the application of 1866 was intentionally in continuation of the prior application; that W. had not been

guilty of laches; that he had not abandoned his application or his invention; and that such public use of the invention did not avoid the patent. *Weston v. White*, 447

See 63, 64.

### 5. Specification.

See 28, 37, 38, 53, 54, 61, 62, 66.

### 6. Assignment.

12. R., the patentee and owner of letters patent, agreed with M., shortly before the patent expired, that he would apply for its extension, and assign the extension, if obtained, to M., and M., in consideration, paid to R. \$500, and agreed to pay him \$1,500 more on receiving such assignment, and also the expenses paid by R. in procuring the extension. R. died without applying for the extension, and left a will appointing his wife his sole executrix, and making her and his daughter the sole beneficiaries. The will was probated in Massachusetts. Afterwards, a corporation, by assignment from M., acquired his rights under said agreement. Thereafter, the widow, as executrix, and acting in the interest of the corporation, applied for and obtained an extension of the patent, the corporation paid her the \$1,500, and she executed to it an assignment of the extended term, which assignment was recorded. The assignment was not made under an order of the Probate Court, and the daughter did not assent to it. In the assignment the widow was described as administratrix, and conveyed her interest as administratrix. After the recording of the assignment, she resigned her trust as executrix, and one I. was appointed administrator with the will annexed, and he, as such, conveyed to the plaintiffs the title on which this suit was brought: *Held*,

(1.) That the corporation became the equitable owner of the patent, and the plaintiffs had constructive notice of such equity, by the recording of the assignment from the widow, before they procured the assignment from I., and were not *bona*

*fide* purchasers; that, as against the plaintiffs, the corporation was entitled to a specific performance of the agreement to assign; and that, therefore, it was not material whether the assignment from the widow was invalid, because made by her as administratrix and not as executrix;

(2.) That the assignment from the widow was valid, although made by her as administratrix;

(3.) That the sale was not invalid because made without an order of the Probate Court, although there was a statute of Massachusetts providing that, on application, the Probate Court might order a sale of personal estate, inasmuch as there was no provision precluding a sale without such order;

(4.) That it was not necessary the daughter should have joined in the assignment, or assented to it. *Newell v. West*, 114

13. An assignment recited the granting of a patent to H., the assignor, and its reissue, and that K. "is desirous of acquiring all my right, title and interest therein, in accordance with the terms and conditions of a certain deed of trust executed by him," and then conveyed to K., in trust, "all my right, title and interest of, in and to the aforesaid reissued letters patent and the invention thereby secured." Afterwards, K. gave a license to W., which recited that both of the patents, and the invention secured thereby, had been assigned, in trust, to K., "for and during the unexpired term for which the same have been granted, and for and during any and all terms to which they or either of them may be extended," and then granted to W. a license under both of the patents, "the same to be exercised during the unexpired terms for which the said patents are granted, and may be hereafter extended." Afterwards, the patent was extended: *Held*, that the license to W. expired with the original term of the patent. *Waterman v. Wallace*, 128

14. K. obtained, by the assignment to him, only the interest of H. for the original term. *Id.*

15. An assignment of "the invention," after a patent has been issued, without any other language to indicate the intention of the parties, does not import a conveyance of the right to an extended term. *id.*

*See* 35.

#### 7. License.

*See* 13, 42 to 50.

#### 8. Reissue.

16. After a bill in equity had been filed for the infringement of a patent for an invention, the patent was surrendered, and a reissued patent was granted. The plaintiff then moved for leave to file a supplemental bill founded on the reissued patent and for an injunction: *Held*, that the motions must be denied, on the ground that, by the surrender and reissue, the suit was at an end, and that the plaintiff must proceed by original bill founded on the reissued patent. *Fry v. Quinlan*, 205

*See* 32 to 34.

#### 9. Extension.

17. W., during the first term of a patent for a folding guide for sewing machines, and while he was the sole owner of such patent, and was also interested in the sale of certain sewing machines, publicly authorized all purchasers of such sewing machines to use such folding guides without compensation. S. owned and used, during such first term, 125 of such sewing machines, and owned and was using, when such first term expired, 56 of such folding guides. The patent was extended: *Held*, that S. had a right to continue to use, during the extended term, such identical 56 folding guides. *Wooster v. Sidenberg*, 88

*See* 12 to 15.

#### 10. Infringement.

18. In a suit in equity on a patent for a machine, brought by B. against W.,

B. obtained a decree that W. had infringed, by making and selling machines, and ordering that W. account to B., both for the damages B. had sustained and for the profits W. had made, by the infringement, and fixing the amount of such damages and profits and directing the mode of payment. The amount was paid. Among the machines embraced in such suit, and covered by such decree, was one which W. had sold to S. After the decree was made, B. made an agreement with P., which was claimed by P. to affect the rights of S. in respect to such machine, and P., as owner of the patent, sued S., in equity, for an infringement by continuing to use the machine, and applied for an injunction to restrain such use: *Held*, that the application must be refused. *Perrigo v. Spaulding*, 389

19. The agreement between B. and P. could not affect the rights of S. *id.*

20. S., by means of the decree and its payment, acquired the right to use the machine until it should be incapable of further use. *id.*

21. The rules stated, as to when a recovery by a patentee against an infringer, and its payment, will carry a right, and when it will not. *id.*

*See* 29, 30, 35, 36, 40, 41, 47, 55 to 57, 68.

#### 11. Injunction.

22. Where a party was convicted of a contempt in violating an injunction, but it appeared that he acted under competent advice, and had no intention of disobeying the order of the Court, no fine was imposed, but he was ordered to pay the costs of the application and of the affidavits. *Carstadi v. United States Corset Co.*, 371

23. Where no question is made as to infringement or priority, or as to the novelty or patentability of the invention, and where the public generally have acquiesced in the claim of the patentee to a monopoly, an ad-

- judication by a Court of law or equity is not required before a preliminary injunction will be granted. *Weston v. White*, 447
24. A junior patent was issued after an interference had been declared by the Patent Office between the application for it and a senior patent, and a decision in favor of the subsequent applicant. The owner of the senior patent then filed a bill against the owner of the junior patent, alleging the conflict of the patents, and that the invention covered by the senior patent was prior in time, and that the defendant had brought suits for the infringement of his patent, and praying that the junior patent might be cancelled, and that, *pendente lite*, such suits on it might be enjoined. A preliminary injunction to that effect being applied for: *Held*, that it could not be granted. *Asbestos Felting Co. v. U. S. Felting Co.* 453
25. The fact of the decision on the interference is sufficient ground for refusing the application. *id.*
26. The defendant ought not to be restrained from bringing suits on his patent, before that patent is adjudged to be invalid. *id.*
- See* 16, 18, 35.
12. *Particular Patents.*
  - (1.) *Stover—Planing Machine.*
27. The 3d claim of letters patent granted to Henry D. Stover, July 23d, 1861, for an "improvement in planing-machines," namely, "The arrangement of matching cutters, to be adjusted both laterally with each other, and vertically upon the bed-piece, essentially as described, in combination with the platen, so that the planing and matching of the piece may both proceed at the same time, or either the planing or matching may be done separately, whether the platen be made movable with the piece secured thereupon, or the platen be fixed, and the piece be made to move thereon," is a valid claim. *Stover v. Halsted*, 95
28. Although lumber cannot be matched upon a movable platen by the machine, because the matching spindles project through apertures in the platen, and would, when in a position for matching, prevent a forward movement of the platen, yet, as the description of the machine in the specification shows that no such mechanical impossibility was contemplated, the claim must be so construed as not to involve such impossibility. *id.*
29. The question of the infringement of said 3d claim, considered. *id.*
30. Said 3d claim is infringed by the devices described in letters patent granted to Rufus N. Meriam, November 5th, 1867, for "improvements in planing machines." *id.*
31. Said 3d claim is not void for want of novelty. *id.*
  - (2.) *Boomer and Boschert—Cheese Press.*
32. Letters patent were granted to George B. Boomer, Rufus E. Boschert and Thomas G. Morse, November 1st, 1870, for an "improvement in cheese presses." They were re-issued to Boomer and Boschert, January 28th, 1873. The claim of the original patent was, "A cheese press, composed of the double frame A, a, A', the press beam B, h, H, sliding standards G, G, double levers C, C, nuts e, and the screw D, with a hand-wheel F, and square end d, all constructed, arranged and operating substantially as described." The claim of the reissue was: "In combination with the sliding standards, supported laterally and guided in the frame of the press, the double screw-shaft supported in or against the sliding standards, substantially as and for the purpose described." It was contended that the reissued patent was for a different invention from the original patent, because the claim of the reissue did not include in the combination the press beam, the double levers and the nuts. The invention was an improvement in a press in which double levers and a

press beam were necessary, and they were fully described in the specification, and the only ingredients which entered into the invention were those specified in the claim of the reissue: *Held*, that the objection was not tenable. *Boomer v. United Power Press Co.*, 107

33. As the claim of the reissue embraces the improvement invented, and the elements of the invention are operative in connection with the mechanism described in the specification, the claim is not invalid because the elements specified in it do not, of themselves, accomplish anything. *id.*

34. The reissue is not invalid for want of novelty. *id.*

35. The plaintiffs, after bringing this suit, conveyed away their exclusive right to the patent for all of the United States, except the New England States and Ohio, reserving their rights "so far as they are connected with said suit, with the profits and damages therein, and the right to have said patent declared valid, and for an injunction:" *Held*, that the plaintiffs reserved no right to damages or profits for infringements committed after the conveyance, and were entitled to a decree for the damages and profits down to the time of the conveyance, but not to an injunction. *id.*

(3.) *Carstaedt—Loom.*

36. The first and third claims of reissued letters patent granted to Hugo Carstaedt, November 19th, 1872, for an "improvement in take-up mechanism for looms for weaving irregular fabrics," the original patent having been granted to him March 30th, 1869, namely, "(1.) The two rolls B and C, continuously rotating at a suitable distance apart, and the series of sectional rollers or wheels D, mounted and operated so as to be pressed wedgewise between them when the take-up is to act, all substantially as and for the purpose herein set forth; (3.) A series of needles, *k, k*, in combination with a take-up composed of rollers or wheels

D, arranged to take up at intervals on parts of the work, and to liberate other parts, substantially as and for the purpose herein specified," are not infringed by a mechanism in which the take-up is not effected by rollers divided in sections, and in which, although the effect of the take-up is sectional, such effect is due not to the sectional action of the take-up but to the action of the lay. *Carstaedt v. United States Corset Co.*, 119

37. The second claim of said patent, namely, "(2.) The needles or points *k, k*, fixed on a stationary bar *K*, and arranged, as specified, so that the fabric, being drawn by the take-up proper, is continuously carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth," is not limited to the sectional take-up described in the patent, nor does it extend to every take-up, regular or irregular, but it embraces the combination of the needle-bar with any take-up mechanism for weaving irregular fabrics. *id.*

38. Thus construed, said second claim is not void for want of novelty. *id.*

39. A change of position of the needle-bar, as involving invention, considered. *id.*

40. The second-claim of reissued letters patent granted to Hugo Carstaedt, November 19th, 1872, for an "improvement in take-up mechanism for looms for weaving irregular fabrics," namely: "The needles or points *k, k*, fixed in a stationary bar, and arranged as specified, so that the fabric, being drawn by the take-up proper, is continually carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth," is infringed by a mechanism wherein, instead of needles fixed in a stationary bar, there are small independent needle rollers, mounted on a fixed shaft,

each roller rotating in the direction of the cloth when the cloth moves forward, but being prevented from moving backward when the tension of the take-up is relaxed, and then becoming stationary, and arresting the fabric and preventing it from being drawn back. *Carstaedt v. United States Corset Co.*, 371

41. Although the new arrangement may be better, and may perform an additional service, it yet performs the same office as the patented device, by the same mechanical means. *id.*

(4.) *Arnold—Ruffle.*

42. Letters patent granted to George B. Arnold, May 8th, 1860, for an "improvement in ruffles," and three other patents, were owned by the plaintiffs, a corporation of New York. They had recovered a verdict in a suit for an infringement of the Arnold patent. The defendants, a corporation of Connecticut, had been infringing that patent. On the 21st of February, 1868, an agreement of license was made between the two corporations, whereby the plaintiffs agreed to license the defendants, under the four patents, to manufacture and sell under such license, exclusively, the ruffle then manufactured and sold by the defendants, and known as "the double ruffle," and to use the patented machines in the manufacture only of the said double ruffle, and whereby, in consideration of said license, the defendants expressly recognized the validity of each of said patents, and agreed to receive licenses as aforesaid under each of them, and expressly agreed that they would manufacture and sell only the said double ruffle, and that the said double ruffle should not be divided by them, and whereby they agreed to submit, at all times, their manufactory to inspection, so that the plaintiffs should be advised of the kind of ruffles which were being manufactured, and to pay counsel in the suit above named, and to retain and pay counsel thereafter in suits relating to and in support of said patents, and to pay one-half of the

other expenses of sustaining said patents, and whereby each party agreed to assist the other in suits which might be instituted by either for the purpose of maintaining its rights under either of said patents. The bill in this suit alleged, that, after the agreement of license was made, the defendants continued to make and sell the double ruffle of the kind referred to in the agreement, and also made and sold, in violation of the agreement and of the Arnold patent, quantities of single ruffles, each of which contained the invention described and claimed in said patent, and prayed for a disclosure by the defendants of their profits and of the number of yards of single ruffle containing said improvement which they had made and sold, and for the payment of such profits and of the damages sustained by the plaintiffs. The answer, besides denying the infringement, denied the novelty of the invention covered by the Arnold patent, and alleged that the defendants had, ever since the agreement was executed, been engaged, to the knowledge of the plaintiffs, in the sale of ruffles which were not claimed by them, until about the time of the commencement of this suit, to violate said patent, and that this suit was brought on a stale claim, and one unfounded in equity: *Held*, that the defendants were estopped, by their covenants in the agreement, from denying the validity of the patent. *Magie Ruffle Co. v. Elm City Co.*, 151

43. The contract was not merely an agreement for a license, but was an executed license. *id.*
44. The plaintiffs could sue for either an infringement of the patent or a breach of the agreement, and the bill in this case could be regarded as a bill in either aspect. *id.*
45. As a bill founded on the agreement, although no royalties were payable, and although the patent had expired, the bill is not open to the objection that there is a complete and adequate remedy at law, because an account and a discovery are necessary to

- ascertain the facts from which the damages to the plaintiffs can be computed, and this bill is a bill for an account and a discovery. *id.*
46. The contract having become executed, and the defendants having enjoyed its benefits, they cannot, in the absence of fraud on the part of the plaintiffs, deny the truth of their admission of the validity of the patent. *id.*
47. The invention in the Arnold patent consists in confining the tucks or gathers in place and securing them to a binding or ungathered piece of cloth, by one and the same series of stitches, or, in other words, causing one series of stitches to perform the double duty of confining the plaits and attaching them to the binding or other material. The claim, namely, the ruffle "as a new article of manufacture, the gathered cloth A (the ruffled strip) being secured to the binding B (the band) by the single series of stitches C, which perform the double duty of confining the gathers and of securing the gathered cloth to the binding, substantially as herein set forth," is infringed by the defendants' ruffle, which is a plaited strip combined with a band, a single row of stitches performing the office of securing the gathers and uniting the gathered cloth to the band, although it has, in addition, a second row of stitches in the band, not securing the band to the gathered cloth, and although it is a finished article, having a band with an even and finished edge, and is designed to be worn as a neck ruffle. *id.*
48. The defendants' ruffle is not a double ruffle, and so within the license, because, if it is divided between the two rows of stitches, one part will be a ruffle, and the other will be a useless strip of stitched cloth, not a ruffle, in any proper sense of the word. *id.*
49. The defence, that the agreement in regard to the manufacture of ruffles other than the double ruffle was subsequently abandoned by the plaintiffs, is not sustained. *id.*
50. Nor is the defence sustained, that the claim has become stale by reason of the laches of the plaintiffs in vindicating their rights, and in acquiescing in the assertion of adverse rights by the defendants. *id.*
- (5.) *Mulford and others—Chain.*
51. The claims of the letters patent granted to Lewis J. Mulford and others, February 24th, 1874, for an "improvement in chains and chain links for necklaces, &c.," namely, "(1.) An ornamental chain for necklaces, &c., formed of alternate closed links A, and open spiral links B, substantially as shown and described; (2.) The open spiral links B, formed of coils of tubing, substantially as shown and described," cover new and patentable inventions. *Mulford v. Pearce*, 173
52. The distinctive feature of the invention consists in constructing the open spiral link of annealed gold tubing, such link possessing a peculiar elasticity, and being easily separated and united to another link without any injury to itself or to the solid link into which it is sprung, and constantly preserving its elasticity and shape. *id.*
53. The first claim is not a claim for an ornamental chain composed of alternate closed links and open spiral links, without reference to the material of which the spiral link is made, but it is a claim for a chain composed of alternate closed links and open spiral links formed of one or more coils of gold tubing, as shown and described. *id.*
54. The process of making gold tubing was well known to manufacturing jewellers, and, therefore, it was not necessary to describe in the specification how it has to be made. *id.*
- (6.) *Decker—Billiard Table Cushion.*
55. The claim of the reissued letters patent granted to Levi Decker, March 9th, 1869, for an "improvement in cushions for billiard tables," the original letters patent having



been granted to him December 18th, 1866, namely, "The catgut or other cord E, partially or fully imbedded, or otherwise attached, at the angle  $\alpha$  of the rubber cushion C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth," is not void for want of novelty, by reason of anything found in the letters patent granted to William K. Winant, August 10th, 1858, for "improvements in cushions for billiard tables." *Decker v. Griffith*, 187

56. In the Winant patent, a strip of steel merely lies in a crease or groove cut in the rubber, and is kept in place without being attached by screws, cement, or otherwise. In the Decker patent, the cord is described as being moulded or imbedded entirely within the rubber. *id.*

57. But, it appearing that, before Decker's invention, billiard tables were made in accordance with the Winant patent, but with the added feature of an arrangement for tying down the steel strip to the cushion, by means of holes in the lower edge of the strip and wires put through them and fastened to the under side of the rail, to keep the strip in place in the rubber, and it further appearing that, prior to Decker's invention, billiard table cushions were made by one S., with a French clock spring placed in a slit cut in the upper face of the rubber, parallel to and near the under face of the rubber, and cemented into the slit, and cloth cemented over the slit: *Held*, that a suit founded on the Decker patent could not be maintained against billiard tables so constructed, or against an arrangement like that of S. but with a round wire substituted for the steel strip. *id.*

(7.) *Green—Driven Well.*

58. The reissued letters patent granted to Nelson W. Green, May 9th, 1871, for a process of constructing wells, are valid. *Andrews v. Carman*, 307

59. The state of the art of constructing

wells at the time Green made his invention, explained. *id.*

60. The peculiar features of Green's well, called the "driven well," explained. *id.*

61. The claim of the patent, namely, "The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upwards, as it is in boring, substantially as herein described," is a claim to a process; and the element of novelty in the process consists in driving a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, so that the process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum in the water-bearing strata of the earth, and at the same time in the well pit. *id.*

62. The claim may also well be construed as claiming the well as a manufacture constructed according to the process described. *id.*

63. The question of the dedication and abandonment of his invention, by Green, to the public, considered. *id.*

64. The question of Green's delay in applying for a patent, for more than four years after he made his invention, considered, as bearing on the question of abandonment. *id.*

(8.) *Earle—Steam Gauge Cock.*

65. The reissued letters patent granted to Oscar T. Earle, assignee of Albert Bisbee, June 14th, 1870, for a compression steam gauge cock, (the original patent having been granted to said Bisbee, September 18th, 1855, and extended for seven years from September 18th, 1869,) are valid. *Dalton v. Nelson*, 357

66. The invention consisted in making one of the surfaces that meet to close

the water way or steam passage, of a piece of vulcanized rubber, instead of making it of metal and facing it with cork, or leather, or soft metal, the other surface being made of metal.

*id.*

67. The substitution of the vulcanized rubber for the prior material produced a new result. *id.*

68. The use, for one of the bearing surfaces, of vulcanized rubber intermingled with other materials, the whole forming one compound, is an infringement of the patent. *id.*

(9.) *Weston—Pulley Block.*

69. The validity of the letters patent granted to Thomas A. Weston, August 6th, 1867, for differential pulley blocks, seems to be generally conceded in the United States, although no adjudication has ever been had in our own Courts. *Weston v. White*, 447

PLEADING.

1. Where a plaintiff in equity, instead of setting down the defendant's plea for argument, replies to it, he admits its sufficiency as a defence, if the facts it alleges shall be established. *Myers v. Dorr*, 22

2. Under § 914 of the Revised Statutes of the United States, a pleading in a suit at law in this Court, which is not authorized in a like suit in a Court of this State, will be set aside on motion. *Lewis v. Gould*, 216

3. The common law forms of pleading are no longer necessary in the United States Courts within the State of New York, nor are they admissible except as they may be deemed to be substantially a compliance with the requirements of the Code of Procedure of the State, as to pleadings. *id.*

See **BANKRUPTCY**, 4.

**EXTRADITION.**

**JURISDICTION**, 1, 2.

**PRACTICE**, 1 to 4, 7.

**REMOVAL OF CAUSES**, 4.

POST OFFICE.

See **INDICTMENT**, 14 to 22.

PRACTICE.

1. A motion to amend a bill by adding new parties defendant, after replication filed and the production of evidence, it appearing that the plaintiff was in a position to make the amendment before replication filed, refused. *Clifford v. Coleman*, 210

2. An action at law commenced in a State Court by summons and complaint was removed into this Court before issue joined. Before removal, an attachment had been issued in the suit, according to the law of the State, and a reference made to take the deposition of a witness to be used on a motion in the suit. After removal, the defendant entered a rule in this Court requiring the plaintiff to declare, and the plaintiff entered a rule in this Court requiring the defendant to plead. The plaintiff now moved to set aside the first rule, and the defendant moved to set aside the second rule, and the plaintiff also moved for leave to proceed in the reference so made and pending, in accordance with the statute of New York: *Held*, that all three of the motions must be granted. *Lills v. New Orleans R. R. Co.*, 227

3. As a complaint had been put in in the State Court, no further pleading on the part of the plaintiff was necessary. *id.*

4. Nor was there any occasion for the plaintiff to enter a rule to plead against the defendant, there being no such practice in the State Court. *id.*

5. The provisions of sections 646, 914 and 915 of the Revised Statutes of the United States, and of sections 4 and 6 of the Act of March 3d, 1875. (18 *U. S. Stat. at Large*, 471, 472,) show an intention to secure in each State one method of procedure in all common law cases, and to attain that result by adopting, in general, the procedure of the State Courts in the respective States. *id.*

6. The distinction between law and equity is preserved, both in substance and in procedure, and the provisions of positive statutes of the United States are not invaded; but, in the absence of such provisions, the State practice prevails. *id.*

7. In a suit in equity on a patent, the defendant, more than one year after the plaintiff's proofs were closed, moved to amend the sworn answer, by averring, on information and belief, that the patented invention was in public use for more than two years before the patent was applied for, and that it was described in a prior patent granted by the United States. The only excuse offered for not inserting the first defence in the original answer was, that the counsel who prepared such answer was under the impression that the suit was subject to the law as it stood prior to the patent Act of July 8th, 1870. As to the second defence, the excuse was, that such counsel had no knowledge or information of any description in any patent prior to the plaintiffs, of a certain device: *Held*, that the motion must be denied. *Webster Loom Co. v. Higgins*, 349

8. On a consent given in open Court, a reference of an action at law was made to a referee, to hear and determine all the issues therein. The referee found for the plaintiff for a sum certain, and a judgment was entered on the report without any application to the Court. The report was, by a clerical error, entitled in the District Court, but it was filed in the Circuit Court, and was proceeded upon as if it had been correctly entitled. There was no other cause pending between the same parties, and no one was misled by the mistake. The defendant moved to set aside the judgment: *Held*,

(1.) That the mistake as to the entitling might be disregarded or amended *nunc pro tunc*;

(2.) That it was not irregular to enter the judgment without an application to the Court, such being the practice of the Courts of the State. *Fourth National Bank of Chicago v. Neyhardt*, 393

9. Suggestions as to the proper mode of obtaining a review of the decision of a referee, where a judgment is entered on his report without having been presented to, or considered by, the Court. *id.*

*See* ADMIRALTY, 1 to 4.  
BANKRUPTCY, 4, 6.  
EVIDENCE, 8.  
JUDGMENT.  
JURY.  
MARSHAL.  
PARTY, 1.  
PATENT, 16.  
PLEADING.  
REMOVAL OF CAUSES, 4.  
TRIAL.  
VERDICT.

# PROTEST.

1. D. entered imported merchandise as "silk ties." The collector exacted a duty of 60 *per cent. ad valorem* thereon, as "silk scarfs," under § 8 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 210.) D. protested against paying such duty, on the ground that the merchandise was "articles worn by men, women and children, and wearing apparel, and should only pay duty at 35 *per cent. ad valorem*," and was "neither scarfs nor ready-made clothing in fact, or as known in trade or commerce." The merchandise was in fact dutiable at 50 *per cent. ad valorem*, as a manufacture of silk, not otherwise provided for, under the concluding clause of said § 8. D. brought this suit to recover back the 10 *per cent.* excess of duty paid, as having been paid under protest: *Held*, that the protest was insufficient, because it did not set forth "distinctly and specifically" the grounds of the objection to the amount claimed, as required by § 14 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 215,) and failed to state the true ground of objection to the duty exacted. *Davies v. Arthur*, 34

# PROVOST MARSHAL.

1. C., a provost marshal appointed under the Act of March 3d, 1863,

(12 *U. S. Stat. at Large*, 732, § 5,) was sued by W. for assault and battery, and false imprisonment. C. contended that he could not be held liable in a civil action for acts done by him in the discharge of the duties of his office of provost marshal: *Held*, that the action would lie. *Walker v. Crane*, 1

2. *Held*, also, that C. had a right to order W. to leave the premises occupied officially by C. as provost marshal, and the right, if W. refused to go, to use so much force as was necessary to remove W. from such premises. *id.*

3. *Held*, also, that, if C. had good reason to believe, and did believe, that W., by language addressed by him to C., was threatening C. for the purpose of interfering with C. in the execution of his official duties as provost marshal, C. was justified in arresting and detaining W. *id.*

4. *Held*, also, that the 4th section of said Act of March 3d, 1863, would not, of itself, bar W.'s right of action.

5. *Held*, also, that W., if entitled to recover, was entitled to his actual damages; and that, if C. was influenced by any motive other than the honest discharge of his official duty, the jury were at liberty to give to W. exemplary damages. *id.*

## R

### RAILROAD.

*See* MORTGAGE.

### RECEIVER.

*See* BANKRUPTCY, 12.  
TAXES, 2, 3.

### RECOGNIZANCE.

*See* CRIMINAL LAW, 1.

### REMISSION.

*See* FORFEITURE.

## REMOVAL OF CAUSES.

1. This action was brought in the Supreme Court of the State for Kings county, in 1869, and thereafter referred to a referee, before whom the plaintiff recovered a judgment, which was set aside by the Court of Appeals, in September, 1874. The remittitur from that Court was filed November 16th, 1874. Before that the referee had died. There were terms of the circuit in Kings county in October and November, 1874, and January, March, and April, 1875. The cause was removed into this Court on the petition of the plaintiff, filed in the State Court, April 24th, 1875, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470): *Held*,

(1.) That this Court was the Circuit Court for "the proper District," within the meaning of § 2 of the Act of 1875, being the Circuit Court for the District within the territorial limits of which the suit was pending in the State Court;

(2.) That the petition for removal was not filed in the State Court in time, under § 3 of said Act, not having been filed before or at the term of the State Court at which the cause could have been first tried. *Knowlton v. Congress Spring Co.*, 170

2. After the reversal of the judgment, the cause could have been again brought to trial in the State Court before the filing of the petition for removal. *id.*

3. Under section 3 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 471,) which requires the application to the State Court for the removal of a cause into the Circuit Court of the United States, to be made "before or at the term at which said cause could be first tried," the term referred to is a term occurring after the passage of the Act, and not a term before such passage. *Merchants' Bank v. Wheeler*, 218

4. Where an action at law removed under said Act is at issue when removed, no other or different pleadings are necessary than those in the State Court. *id.*

5. An action at law at issue in a State Court was called for trial therein, and might, in the ordinary course, have been tried. The defendant applied for a postponement. This was refused by the Court, except upon terms of the defendant's consenting to a reference. This he refused to do, but afterwards, and before the trial was actually commenced, he consented to a reference of the same for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. The defendant then took proceedings to remove the cause into this Court, under section 639, subdivision 3, of the Revised Statutes of the United States, on the ground of prejudice or local influence. On a motion by the plaintiff to remand the cause to the State Court: *Held*, that the defendant had waived his right to claim a removal of the cause under the section above named. *Hanover Bank v. Smith*, 224
6. A party to a suit may, in that particular suit, waive his right to remove the suit to the Federal Court; and he may make such waiver after the suit is brought, not only by a stipulation or agreement, but by conduct which is equivalent to a waiver. *id.*
7. A suit in a State Court, which falls within the description of suits removable into this Court, may be removed, although it could not originally have been brought in this Court. *Warner v. Pennsylvania R.R. Co.*, 231
8. That principle is not changed by the provision of section 5 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 472), which provides for the dismissal or remanding by this Court of suits not really and substantially involving a dispute or controversy within the jurisdiction of this Court. *id.*
9. Under § 3 of said Act of 1875, which provides that a suit cannot be removed unless the application for removal is made before or at the term at which the cause could be first tried, if the term at which the cause could otherwise be first tried is one which occurs during the time a trial of the cause is stayed by an order of the State Court, it is not such a term as is meant by the statute. *id.*
10. The plaintiff took proceedings in December, 1875, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) to remove into this Court a suit brought by him in a State Court. The State Court made an order that the cause be removed, but eighteen days afterwards vacated such order. A term of this Court began on the first Monday of April, 1876. The plaintiff, although he had, in January, 1876, obtained from the clerk of the State Court a certified copy of the record, did not file it in this Court, or enter his appearance there, but, in May, 1876, applied to this Court to issue a *certiorari* to the State Court, commanding it to remove the suit to this Court, and to certify the record therein according to law: *Held*, that the plaintiff had been guilty of laches, and could not be allowed now to perfect the removal of the cause; that he already had all which the *certiorari* could give to him; and that the application must be refused. *Broadnax v. Eisner*, 366
11. Citizens of New York brought an action of trover in a State Court against a citizen of New York and citizens of Connecticut. All the defendants took proceedings to remove the suit into this Court, under the 2d section of the Act of March, 3d, 1875, (18 *U. S. Stat. at Large*, 470,) as being a suit in which there was "a controversy between citizens of different States:" *Held*, that the controversy in the suit was not one between citizens of different States, and that the cause must be remanded to the State Court. *Peterson v. Chapman*, 395
12. The only changes introduced by this part of the 2d section of the Act of 1875 are, that either party, plaintiff or defendant, may remove the cause, and that it is no longer

necessary that either party shall be a citizen of the State in which the suit is brought; but it still remains necessary that the State citizenship of each individual plaintiff shall be different from the State citizenship of each individual defendant, to authorize a removal under this part of said section. *id.*

*See PRACTICE, 2 to 4.*

## REVENUE LAW.

*See CRIMINAL LAW, 2, 3.*  
*INDICTMENT, 1 to 10.*

## S

### SHIPPING.

*See COLLISION.*  
*LIEN.*

### SHIPPING COMMISSIONER.

1. Under the Act of June 7th, 1872, (17 *U. S. Stat. at Large*, 262,) authorizing the appointment of shipping commissioners, (now Title 53 of the Revised Statutes,) although it is provided that "the salary, fees and emoluments" of a commissioner shall not be more than \$5,000 *per annum*, and that "any additional fees shall be paid into the Treasury of the United States," and that the commissioner may engage clerks "at his own proper cost," and that he shall lease, rent or procure premises "at his own cost," yet the necessary and proper expenses of his office for clerk hire, and rent of premises, and other matters are first to come out of the fees he receives, and then he may retain, as his emolument, out of such fees; \$5,000 *per annum*, and then any of the fees which remain are to be paid into the Treasury. *In re Shipping Commissioner*, 339

### STATUTE.

1. Where a new rule is sought to be

applied to past acts, the expression of the legislative purpose ought to be clear and distinct. *Oxford Iron Co. v. Slafter*, 455

2. When an amendatory law contains express provisions fixing the period of its retroaction in certain specified cases, such specification almost necessarily leads to the conclusion that, in all other unspecified cases, the amendment is not to have a retroactive effect. *id.*

*See CONSTITUTIONAL LAW, 1 to 3.*  
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## STEAMBOAT.

*See* COLLISION, 1, 3, 4, 5 to 9.

## SUCCESSION.

*See* INTERNAL REVENUE.

## SURETY.

1. A. was surety for one S., as post-master, on his official bond. On the 14th of September, 1861, a new bond, with other sureties, was accepted, whereby A. was, by statute, released from responsibility for all acts or defaults of S. committed subsequently. S. was afterwards removed from office, and at that time was a debtor to the United States. In a suit brought against A., on his bond, to recover such debt, it was not shown by the United States that S. had not in his hands, on the 14th of September, 1861, ready to be paid or applied, all the moneys of the United States with which he was justly chargeable: *Held*, that it must be presumed he had such moneys in his hands when the new bond was given, and that A. was not liable therefor. *Alvord v. United States*, 279

## T

## TARIFF.

*See* DUTIES.

## TAX.

1. There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a Court of justice, for the purposes of a suit pending in such Court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the Government within whose jurisdiction such property is situated. *Stevens v. N. Y. & Oswego Midland R. R. Co.*, 104

2. Except under very special circumstances the power of taxation ought not be interfered with by injunction. *id.*

3. In a suit pending in this Court for the foreclosure of a mortgage given by a railroad corporation, receivers of the mortgaged property were appointed by this Court. They applied to this Court to enjoin certain tax collectors from executing warrants for taxes assessed on the mortgaged property, on the ground of irregularities in the assessment of the taxes. So far as appeared, the warrants were regular on their faces and the tax collectors were acting thereunder in good faith, in the discharge of their duty. The injunction was refused. *id.*

*See* INTERNAL REVENUE.

## TOWN BOND.

*See* COUPON.

MUNICIPAL CORPORATION, 1 to 4, 11 to 17.

## TRADE-MARK.

1. The plaintiffs had a right to use, as a trade-mark, in connection with packages of a medical preparation put up and sold by them, and known as "Hamburg tea," the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," in an oval. The defendant had, at one time, sold his article of Hamburg tea in packages, with a label containing the name of "J. C. Frese & Co." Although he claimed to have discontinued the use of such label: *Held*, that he had rendered himself liable to an injunction in that respect. *Frese v. Bachof*, 234
2. The plaintiffs also made a claim to the color of the wrappers and notices and directions tied up with the wrappers, and also to the general size and appearance of the packages in which they had been accustomed to sell their Hamburg tea, independently of such trade-mark or label. The defendant's packages were of the



- same size and general shape as those of the plaintiffs, and the color of the envelopes and of the printed notices and directions for use, tied up with the envelopes, was nearly the same; but the labels on the plaintiffs' packages contained, in a plain round label, the words "J. C. Frese & Co.," and, embossed in an oval, on an oblong white label, the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," while the defendant's label contained, in a round white label, the name "Ed. Bachof & Co.," and, on an oblong white label, embossed in an oval, "Ed. Bachof & Co., No. 39, Hamburg:" *Held*, that, on this branch of the case, a preliminary injunction must be refused. *id.*
3. B. invented a medicine which he called "Dr. J. Blackman's Genuine Healing Balsam," and made and sold it under that name. In 1865, B. conveyed to F. the exclusive right to use B.'s name in making and selling such medicine, for 10 years, for a sum to be paid every three months during that time, and, if F. performed his contract for the full 10 years, then B. granted to F. "all of the rights and privileges" to use B.'s name in making and selling such medicine, without fee or reward to B., for 50 years: *Held*, that F. acquired, after the 10 years, the same exclusive right which he had during the 10 years, and that his right for the 50 years was exclusive as against B. and subsequent grantees of B. *Filkins v. Blackman*, 440
4. The name of such medicine is a valid trade-mark; and the exclusive right to use such trade-mark will pass, by assignment, to any one who has lawfully obtained from the inventor of the medicine the exclusive right, also, to make and sell, and who does sell, the medicine compounded according to the original formula. *id.*
5. When a partnership is formed to make an article to which a given trade-mark is properly applied, such trade-mark, if belonging to one partner, becomes, in the absence of special regulations, part of the partnership property. *id.*
6. A preliminary injunction granted to restrain the use of such trade-mark. *id.*
7. The registration of a trade-mark for "paints" by A., who had previously acquired the exclusive use of such trade-mark for particular kinds of paints only, does not enable A. to restrain B. from using such trade-mark upon another kind of paint, to which B. had been in the habit of affixing such trade-mark prior to such registration, *Smith v. Reynolds*, 458

## TRIAL.

1. Section 746 of the Revised Statutes provides, that, when a trial has been commenced and is in progress before a jury or the Court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of the Court. On the trial of an indictment, after several jurors had been called and challenged, and three had been found competent and sworn, the Court, on the last day of the term, directed that the trial proceed on the following day, which was the first day of the succeeding term. It so proceeded, and, after a conviction, it was, on a motion in arrest of judgment, *Held*, that the trial had been commenced and was in progress, although a full jury was not empanelled before the term ended. *United States v. Loughery*, 267
2. If, after the trial of an indictment is commenced, the accused escapes from custody, and, for that reason, his further attendance cannot be had, the trial may proceed in his absence. *id.*

*See* INDICTMENT, 18.  
JURY.  
NEW TRIAL.  
VERDICT.

## TRUSTEE.

*See* CORPORATION, 14.  
EVIDENCE, 6.  
NEW TRIAL.

## U

## UNITED STATES.

*See* BANKRUPTCY, 1.

## V

## VERDICT.

1. Errors committed, on the trial of an action at law against the party who obtains a verdict, are merged in the verdict. *Schneider v. Barney*, 87

*See* NEW TRIAL.

## VESSEL.

*See* COLLISION.

LIEN.

WHARFAGE.

## W

## WHARFAGE.

1. Under the statute of New York,

(*Act of May 21st, 1875, Laws of New York, of 1875, p. 482.*) fixing the rates of wharfage to be paid by vessels, a vessel which makes fast to two distinct landing places must pay accordingly. *The Virginia Rulon*, 519

2. If she leaves a wharf without paying the wharfage due, she becomes liable, under said statute, to pay double the rates established by the statute. *id.*
3. The added amount is not a penalty, but is a wharfage rate, and the statute gives a lien on the vessel for the entire sum, including the added amount. *id.*
4. Such lien is enforceable in Admiralty against the vessel. *id.*

## WITNESS.

*See* EVIDENCE, 8.



















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